Supreme Court, U.S.
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No. 04-944

In The Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 701(b) of Title VII of the 1964 Civil Rights Act applies the Title VII prohibition against employment discrimination to employers with fifteen or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim?

PARTIES

The petitioner is Jenifer Arbaugh. The respondent is the Y & H Corporation, doing business as The Moonlight Cafe.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jenifer Arbaugh respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 2, 2004.

OPINIONS BELOW

The August 2, 2004, decision of the Court of Appeals, which is reported at 380 F.3d 219 (5th Cir. 2004), is reprinted in the Appendix to the petition. (App. 1-27). The October 13, 2004, decision of the Court of Appeals, denying the petition for rehearing en banc, which is not officially reported, is reprinted in the Appendix. (App. 50). The April 30, 2003 decision of the District Court, 2003 WL 1797893 (E.D.La.), which is not officially reported, is reprinted in the Appendix to the petition. (App. 24-44). The December 27, 2002 order of the District Court, which is not officially reported, is reprinted in the Appendix to the petition. (App. 45-49).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 2, 2004. A timely petition for rehearing en banc was denied on October 13, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-(b), provides in pertinent part:

> The term "employer" means an employer engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .

Section 703(f)(3) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3), provides in pertinent part:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

Section 1331 of 28 U.S.C. provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

In 2001 petitioner Jenifer Arbaugh commenced this action in federal district court against her former employer, Y & H Corporation.[1] The plaintiff alleged that she had been sexually harassed, that a co-owner of the firm had assaulted her while at work, and that these actions resulted in her constructive discharge. Plaintiff sought

[1] Petitioner also sued one of the owners of the corporation. The jury returned a verdict in favor of that defendant on that claim.

relief under Title VII of the Civil Rights Act of 1964 and under Louisiana tort law.

The defendant did not initially dispute either the applicability of Title VII or the subject matter jurisdiction of the court. After a jury trial, the jury found that plaintiff had been sexually harassed and constructively discharged, and awarded her $5,000 in back pay, $5,000 in compensatory damages, and $30,000 in punitive damages. The trial court entered judgment for plaintiff on November 5, 2002.

Fourteen days later, on November 19, 2002, the defendant filed a post-trial Motion to Dismiss for Lack of Subject Matter Jurisdiction. The defendant contended that during the relevant time period it had fewer than fifteen employees, and included with the post-verdict motion a detailed analysis of its payroll records. Section 701(b) of Title VII defines an "employer" subject to that title as an employer with fifteen or more employees. Because the defendant had not raised this contention prior to or at trial, it would ordinarily have been waived. However, the defendant contended that the lack of the requisite fifteen or more employees did not simply go to the merits of the claim, but rather deprived the district court of subject matter jurisdiction over the Title VII claim.

The district court agreed, holding that the fifteen-employee requirement in section 701(b) is indeed jurisdictional, and that the defendant could therefore raise this objection at any time in the proceedings, including after entry of judgment. The district court commented:

> It is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict. The

> unfairness is compounded by the likelihood that Arbaugh's state law claims are prescribed. Unfortunately none of these considerations are sufficient to confer subject matter jurisdiction w[h]ere it is lacking.

(App. 47).

The dispute regarding whether the defendant in fact had fifteen employees was referred, with the consent of the parties, to a Magistrate Judge instead of the District Judge. On April 4, 2003, five months after the original jury verdict and entry of judgment, the Magistrate Judge concluded that the defendant had fewer than fifteen employees during the relevant period of time. The district court then vacated the jury verdict in favor of plaintiff, and dismissed the entire action for lack of subject matter jurisdiction. (App. 24-44).

On appeal the threshold question raised by the parties, and addressed by the Fifth Circuit, was whether the fifteen-employee requirement in section 701(b) limits the subject matter jurisdiction of the federal courts. The parties[2] and the court[3] agreed that the courts of appeals other than the Fifth Circuit are divided as to whether the fifteen-employee rule is jurisdictional. In its opinion of August 2, 2004, the Fifth Circuit panel held that the fifteen-employee requirement is jurisdictional. (App. 5-9). The court of appeals affirmed as not clearly erroneous the district court's finding that the defendant in fact had fewer than fifteen employees. (App. 10-21).

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[2] Plaintiff-Appellant's Original Brief, pp. 15-20; Original Brief on Behalf of Defendants-Appellees, pp. 11-12.

[3] App. 5-7.

Plaintiff filed a timely petition for rehearing en banc, asking the Fifth Circuit to reconsider the panel's holding that the requirement of section 701(b) is jurisdictional. That petition expressly noted that the panel decision was in conflict with decisions in several other courts of appeal.[4] On October 13, 2004, the Fifth Circuit denied the petition for rehearing en banc.

REASON FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED REGARDING WHETHER THE EMPLOYMENT NUMEROSITY REQUIREMENTS IN FEDERAL EMPLOYMENT LAWS ARE JURISDICTIONAL

The decision below is the latest iteration of a long-standing dispute among the lower courts regarding when elements of or restrictions on a federal claim are "jurisdictional." For years some lower courts have debated whether the statutory provisions establishing the elements of a federal claim merely govern the merits of those claims, or whether they also limit the subject matter jurisdiction of the federal courts. As this case starkly illustrates, whether or not such a statutory provision is deemed jurisdictional can in a variety of circumstances determine the outcome of litigation.

Much of this dispute, as in the instant case, has concerned federal statutes regulating employment practices. Several major federal employment statutes apply

[4] Petition for Rehearing En Banc, pp. 5-6.

only to employers which have a specified minimum number of employees. Title VII, for example, defines the "employer[s]" to whom it applies to include only employers which have at least fifteen employees. 42 U.S.C. § 2000e-(b).[5] *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997). The Fifth Circuit,[6] and several others,[7] hold that this employee numerosity requirement is jurisdictional; a comparable number of circuits insist, to the contrary, that this requirement is merely an element of the merits of a case.[8]

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[5] The Americans With Disabilities Act applies to employers with fifteen or more employees. 42 U.S.C. § 12111(5). The Family and Medical Leave Act applies to employers with more than fifty employees. 29 U.S.C. § 2611(4). The Age Discrimination in Employment Act applies to employers with more than twenty workers. 29 U.S.C. § 630(b).

[6] App. 5-9; *Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 198 (5th Cir. 1994) ("the district court lacks subject matter jurisdiction over an employment agency that is sued in its capacity as an employer when the agency has fewer than fifteen employees."); *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989); *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974, 980 (5th Cir. 1980).

[7] *Ferroni v. Teamsters, etc., Local No. 22*, 297 F.3d 1146, 1151 (10th Cir. 2002); *Daggitt v. United Floor and Commercial Workers Int'l Union*, 245 F.3d 981, 985-86 (8th Cir. 2001); *Childs v. Local 18, Int'l Brotherhood of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Armbruster v. Quinn*, 711 F.2d 1332, 1334 (6th Cir. 1983); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980).

[8] *Doe v. Goldstein's Deli*, 82 Fed. Appx. 773, 777 (3d Cir. 2003); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72 (3d Cir. 2003), *cert. denied*, 142 Sup. Ct. 1714 (2004); *Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000); *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n. 1 (7th Cir. 1996); *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987).

This problem and inter-circuit conflict are not limited to Title VII. The same question has arisen, and led to the same disagreement, with regard to the employee numerosity requirements of the Americans With Disabilities Act,[9] the Age Discrimination in Employment Act,[10] and the Family and Medical Leave Act.[11] An analogous problem has divided the lower courts regarding whether certain provisions in ERISA are jurisdictional.[12] Similar disputes have arisen regarding whether other provisions of federal employment statutes are jurisdictional.[13] The lower courts

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[9] *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 and n. 1 (10th Cir. 2003) (ADA employee numerosity requirement is jurisdictional; noting "some disagreement among the circuits" about the issue); *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621 (D.C. Cir. 1997) (ADA employee numerosity requirement is not jurisdictional).

[10] *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997) (ADEA employee numerosity requirement is not jurisdictional); *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987) (ADEA employee numerosity requirement is not jurisdictional).

[11] *Morrison v. Amway Corp.*, 323 F.3d 920, 928 n. 1 (11th Cir. 2003) (FMLA employee numerosity requirement not jurisdictional); *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) (FMLA employee numerosity requirement is jurisdictional); *Douglas v. E.G. Baldwin & Associates*, 150 F.3d 604 (6th Cir. 1998) (FMLA employee numerosity requirement is jurisdictional).

[12] *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182 (2d Cir. 1996); *Bleiler v. Cristwood Construction, Inc.*, 72 F.3d 13 (2d Cir. 1995).

[13] *See Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001-02 (7th Cir. 2003) (whether employer is in an industry affecting commerce, and thus subject to Title VII, is not jurisdictional), *cert. denied sub nom. Apna Ghar, Inc. v. Johnson*, 540 U.S. 984 (2003); *EEOC v. The Chicago Club*, 86 F.3d 1423, 1428 (7th Cir. 1996) (whether employer is entitled to the Title VII exemption for private clubs is not jurisdictional); *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (whether the White House is an "executive agency" covered by Title VII is not jurisdictional); *Kicler v. Nimishillen and Tuscarawas Rwy. Co.*, 13 F.3d 184 (6th Cir.

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are divided on these questions as well, generally treating these other issues as controlled by their (conflicting) views regarding whether employee numerosity requirements are jurisdictional.

In addition to the Fifth Circuit in the instant case, the Fourth,[14] Sixth,[15] Eighth,[16] Ninth,[17] and Tenth[18] Circuits hold that employee-numerosity requirements in federal statutes are jurisdictional. On the other hand, the Second, Third, Seventh, Eleventh and District of Columbia Circuits insist that these requirements are not jurisdictional. The existence of this inter-circuit conflict is widely recognized.

The decision of the Fifth Circuit in the instant case is only the most recent in a series of Fifth Circuit decisions holding that the Title VII employee numerosity requirement is jurisdictional.[19] The panel decision below recognized

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1993) (whether a railroad is a "common carrier", and thus subject to the Federal Employers Liability Act, is a jurisdictional question); *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987) (whether plaintiff is an employee within the meaning of Title VII, the ADEA and the ADA is jurisdictional); *Woodard v. Virginia Board of Bar Examiners*, 598 F.2d 1345, 1346 (4th Cir. 1979) (whether state bar examiners could be considered "employer" of unsuccessful bar applicant was jurisdictional question).

[14] *Hukill v. Auto Care, Inc.*, 192 F.3d 437 (4th Cir. 1999) (FMLA).

[15] *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604 (6th Cir. 1998); *Armbruster v. Quinn*, 711 F.3d 1332, 1334 (6th Cir. 1983).

[16] *Daggitt v. United Floor and Commercial Workers Int'l Union*, 245 F.3d 981, 985-86 (8th Cir. 2001).

[17] *Childs v. Local 18, Int'l Brotherhood of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983).

[18] *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976 (10th Cir. 2003); *Ferroni v. Teamsters, etc., Local No. 22*, 297 F.3d 1146, 1151 (10th Cir. 2002); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980).

[19] *See* n. 6, *supra*.

the existence of the intercircuit conflict on this issue, and chose to adhere to Fifth Circuit precedent.

> Noting a circuit split on this issue, Arbaugh cites the Second Circuit. . . . Arbaugh relies also on the Seventh Circui[t]. . . .
>
> Defendants, on the other hand, simply argue that we must adhere to our Circuit precedent. . . . Defendants contend that while the Second, Seventh and Federal Circuits view the statutory definition of an employer as an issue which goes to the merits of the case, the Fifth Circuit is joined by five other circuits in concluding otherwise. . . .
>
> Because we are bound by our prior precedent, Arbaugh's argument that the census issue is not jurisdictional must fail.

(App. 5-7).[20]

Five circuits have expressly rejected the view of the Fifth Circuit.

The Second Circuit has noted the existence of this conflict and held that the Title VII employee numerosity requirement is not jurisdictional, expressly listing the Fifth Circuit among the courts of appeals with which it avowedly disagrees.

> The rulings in other circuits are mixed. The Seventh Circuit has ruled that the fifteen-employee requirement of Title VII is not jurisdictional . . .

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[20] The reference to a decision in the Federal Circuit is an error. The decision cited in the brief of the defendant was in the District of Columbia Circuit.

> and the District of Columbia Circuit, considering the same requirement of the Americans with Disabilities Act, . . . has also ruled that the requirement is not jurisdictional. . . .
>
> Other circuits, however, have ruled, with little or no discussion, that the requisite number of employees is jurisdictional in Title VII cases, *see* . . . *Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 198 (5th Cir. 1994). . . .
>
> Taking what we believe is an appropriately limited view of the nature of issues that should determine subject matter jurisdiction and examining the wording of Title VII's jurisdictional statute, we agree with the Seventh and District of Columbia Circuits that the threshold number of employees for application of Title VII is not a jurisdictional issue, at least so long as a plaintiff . . . makes a non-frivolous claim that the defendant is a covered employer.

Da Silva v. Kinsho International Corp., 229 F.3d 358, 364-68 (2d Cir. 2002).[21]

The Third Circuit has recognized the conflict as well, and has rejected the Fifth Circuit rule.

> The question whether Title VII's fifteen-employee threshold is a jurisdictional prerequisite when a plaintiff brings a colorable Title VII claim has divided the courts of appeals. The Second and Seventh Circuits conclude that it is a substantive element that the plaintiff must

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[21] *See Bleiler v. Cristwood Construction, Inc.*, 72 F.3d 13, 15 n. 1 (2d Cir. 1995); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182 (2d Cir. 1996) (fact that employee had no right to benefits under ERISA related to merits of his claim, not subject matter jurisdiction of court).

> prove. . . . Moreover, the D.C. Circuit has held the Americans with Disabilities Act's . . . fifteen-employee threshold an element of the merits. . . . In this context, the ADA's fifteen-employee requirement is in all relevant respects indistinguishable from Title VII's.
>
> By contrast, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have said that the fifteen-employee threshold is jurisdictional. . . .
>
> Turning to Title VII, we note that those courts that have held the fifteen-employee requirement jurisdictional have provided no reasons for their holding; rather, they have assumed it so or stated the conclusion without meaningful analysis. Moreover, in reading 42 U.S.C. § 2000e(b) we perceive no congressional intent to make the requirement jurisdictional. . . .
>
> [W]e hold that . . . the fifteen-employee threshold is a substantive element (whether an "employer" exists) of a Title VII claim and is not jurisdictional.

Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 77-84 (3d Cir. 2003) (footnote omitted), *cert. denied*, 142 Sup. Ct. 1714 (2004).[22]

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[22] The petitioner in *Nesbit* had prevailed in the Third Circuit on the issue of whether the employee numerosity requirement was jurisdictional, but nonetheless lost in the court of appeals because that court concluded that the defendant employer did not have fifteen employees, and that the action should therefore be dismissed on the merits.

> [W]e affirm the dismissal of Nesbit's complaint. But we part with the District court on the path to this result. It viewed

(Continued on following page)

The Seventh Circuit has repeatedly held that the employee numerosity requirement of Title VII and other federal statutes is not jurisdictional,[23] expressly overruling[24] an earlier Seventh Circuit decision to the contrary.[25]

> The parties made two assumptions in the district court that affect how this contention was resolved. The first is that the number of employees is a "jurisdictional" issue, which the district judge may decide under Fed.R.Civ.P. 12(b)(1) by receiving evidence and making findings. This assumption is incorrect. Sharpe presents a nonfrivolous claim under federal law; no more is necessary for subject matter jurisdiction. A plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet a statutory requirement. There is a gulf between defeat on the merits and a lack of jurisdiction.

Title VII's "fifteen or more" person requirement as jurisdictional. We affirm the dismissal of Nesbit's complaint on the merits rather than for lack of subject matter jurisdiction.

347 F.3d at 74-75.

The outcome in *Nesbit* ultimately turned on the fact-bound conclusion of both lower courts that, in determining whether Title VII applied, the defendant employer Gears Unlimited, Inc. (which admittedly had fewer than fifteen emloyees) should not be considered part of a single integrated employer together with a larger related entity. 347 F.3d at 84-89.

[23] *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998).

[24] *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n. 1 (7th Cir. 1996).

[25] *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 579 (7th Cir. 1993).

Sharpe v. Jefferson Distributing Co., 148 F.3d 676, 677 (7th Cir. 1998).

The Eleventh Circuit has also recognized the conflict on this issue, and held that employee numerosity requirements are not jurisdictional.

> We have surveyed the opinions of other circuits and note a split in authority regarding whether challenges to employer status under federal employment statutes are jurisdictional or intertwined with the merits. . . . In our view, those courts ruling the issue to be only jurisdictional have been fairly criticized as providing "little or no discussion" to explain their reasoning. Even if we were inclined to treat the issue as solely jurisdictional, we are bound by our precedent in *Garcia [v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997)] that holds otherwise.

Morrison v. Amway Corp., 323 F.3d 920, 928 n. 11 (11th Cir. 2003). The earlier Eleventh Circuit decision in *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256, 1265 (11th Cir. 1997), had expressly relied on the 1986 Fifth Circuit decision in *Clark v. Tarrant County, Texas*, 798 F.2d 736, 742 (5th Cir. 1986). In the instant case, however, the panel below expressly disavowed *Clark* as inconsistent with prevailing Fifth Circuit precedent. (App. 7-8).

Finally, the District of Columbia Circuit has held that employee numerosity requirements are not jurisdictional, expressly rejecting the very Fifth Circuit decision, *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974 (5th Cir. 1980), relied on by the panel decision below. (App. 7).

> The question whether [the defendants] have enough employees to be covered under the ADA

> does not affect the jurisdiction of the district court. . . .
>
> We acknowledge that at least three circuits have treated the question whether an employer has sufficient employees to be covered under Title VII . . . as jurisdictional. . . . *Dumas v. Town of Mount Vernon, Alabama*. . . . Nevertheless, none of the courts has explained why the question is jurisdictional. Nothing in Title VII (or the ADA) expressly limits the district court's subject matter jurisdiction. . . .
>
> If the [defendants] are not covered under the ADA, this fact does not preclude the district court from asserting jurisdiction.

EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621, 623-24 (D.C. Cir. 1997). In a concurring opinion, however, Judge Sentelle, while acknowledging that he was bound by Circuit precedent in the District of Columbia Circuit, expressed personal agreement with the contrary rule in the Fifth Circuit.[26]

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[26] 117 F.3d at 626:

> "I . . . write separately . . . to express my misgiving about a point of previously established circuit law; that is, that the question of the number of employees goes to the sufficiency of a complaint under Rule 12(b)(6) as opposed to jurisdiction under Rule 12(b)(1). [A]s the majority notes, three other circuits have treated the employee numbering requirement drawn from . . . Title VII . . . as jurisdictional. . . . *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974, 979-80 (5th Cir. 1980). While it is true, as the majority notes, that none of the courts discussed why the question is jurisdictional, I nonetheless believe they have it right."

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT

The Fifth Circuit rule applied in the instant case, is squarely inconsistent with the standard for determining federal question jurisdiction utilized by this Court for almost half a century since *Bell v. Hood*, 327 U.S. 678 (1946). A district court has jurisdiction whenever "the right of the [plaintiffs] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." 327 U.S. at 683.

The *Bell v. Hood* standard is manifestly satisfied in a Title VII case such as this in which a plaintiff alleges that the employer had the requisite fifteen employees, regardless of whether that contention is ultimately sustained. In the instant case whether the defendant had fifteen employees turned on whether the company's drivers, or the wives of the company's owners, were "employees" within the meaning of section 701(f) of Title VII. (App. 10-21). The answer, and plaintiff's right to recover, were thus governed by an interpretation of section 701(f). The court below correctly observed that "whether a person is an employee under Title VII is a question of federal law . . . to be ascertained through consideration of the statutory language of the [Civil Rights] Act, its legislative history, existing federal case law, and the particular circumstances at hand." (App. 11, *quoting Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1159-60 (5th Cir. 1986).) In resolving whether the defendant was an employer within the meaning of Title

VII, the court below applied a seven-part legal standard from *Broussard*, an eleven-part legal standard from *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), and a six-part standard from *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). (App. 12-21). Because the outcome of the case obviously turned on the construction of a federal statute, there clearly was subject matter jurisdiction over the case.

The actual jurisdictional provision in Title VII, section 706(f)(2), is indistinguishable from the jurisdictional provision involved in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Section 706(f)(2) of Title VII provides:

> Each United States district court . . . shall have jurisdiction of actions *brought under* this title.

(Emphasis added). The jurisdictional provision of the statute in question in *Steel Company* provided:

> The district court shall have jurisdiction in actions *brought under* subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

42 U.S.C. § 11046(c) (Emphasis added). This Court made clear in *Steel Company* that such language did *not* mean that the court would lack subject matter jurisdiction if any of the elements of a claim were missing. "It is unreasonable to read this [section 11046(c)] as making all the elements of the cause of action under subsection [11046](a) jurisdictional." 523 U.S. at 1010-1012. If the acts about which the plaintiff in *Steel Company* complained did not

violate the commands of subsection 11046(a), that would mean only that the plaintiff would lose on the merits, but not that the court lacked subject matter jurisdiction under subsection 11046(c). "In referring to actions 'brought under' § 11046(a), § 11046(c) means suits *contending* that § 11046(a) contains a certain requirement." 523 U.S. at 1012 (Emphasis in original). Similarly, an employment discrimination action contending that a discriminatory defendant is an employer within the meaning of section 701(b) is an action "brought under" Title VII, and is thus within the jurisdictional grant of section 706(f)(2), even if that contention is ultimately unsuccessful.

In *Steel Company* this Court warned of the dangers of "drive-by jurisdictional rulings." 523 U.S. at 91. Federal courts at all levels have at times used the term "jurisdictional" in a profligate manner. *See Carlisle v. United States*, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring). Issues had been labeled as jurisdictional in cases in which nothing of substance turned on that characterization. But, as explained *infra*, whether or not a statutory provision is indeed jurisdictional can have profound and dispositive impact on the litigation of other cases. For that reason, this Court in *Steel Company* admonished that casual dicta regarding whether an issue is jurisdictional should "have no precedential effect." 523 U.S. at 91.

The Fifth Circuit decision in this case flies in the face of that admonition. The panel below relied on a 1980 Fifth Circuit decision in *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974 (1980). The jurisdictional holding in *Dumas*, however, was precisely the sort of casual remark that *Steel Company* instructed the lower courts to disregard. After holding that the defendants in *Dumas* did not have the fifteen employees required under Title VII,

Dumas concluded that "dismissal of the Title VII claims against them *for lack of subject matter jurisdiction* was proper." 612 F.3d at 980 (Emphasis added). The inclusion in the opinion of these six italicized words had no operational significance in *Dumas* itself. But in the instant case, whose outcome turns on the very question of whether the employee numerosity requirement limits the subject matter jurisdiction of the court, the Fifth Circuit has attached conclusive precedential significance to precisely the sort of drive-by jurisdictional ruling in *Dumas* to which this Court has expressly objected.

The decision below is also inconsistent with this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In *Zipes* this Court rejected a similar contention that section 706(e) of Title VII, which establishes the time limit for filing a charge with EEOC, is jurisdictional. The Court held that the actual jurisdictional provision of Title VII, section 706(f), is distinct from the other procedural and substantive provisions of Title VII.

> The provision granting district courts jurisdiction under Title VII, [sections 706(f)], does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

455 U.S. at 393-94 (footnote omitted). Precisely the same is true of the relationship between section 706(f) (conferring jurisdiction over Title VII cases) and section 701(b)

(defining who is an "employer" subject to the requirements of Title VII). Section 706(f) confers jurisdiction over all actions "brought under" Title VII; it contains no reference to the Title VII definition of an employer, and is not limited to cases in which the plaintiff successfully meets that or any other requirement. Conversely, the definition of employer is in an entirely separate section; section 701(b), like section 706(e) in *Zipes*, "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."

III. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

As the Seventh Circuit has correctly observed, "[t]here is a gulf between defeat on the merits and a lack of jurisdiction." *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998). In this case, as in many others, that difference is outcome determinative.

Whether the employee numerosity requirement is jurisdictional determines whether, as occurred in the instant case, a defendant can postpone raising that issue until after it knows the outcome of a trial on the merits. If the employee numerosity requirement in Title VII is non-jurisdictional, any defense or objection on that basis in the instant case was indisputably waived. It was not until after the defendant had lost at trial, and judgment on the merits had been entered against it, that the defendant first asserted that it had too few employees to be an employer within the scope of Title VII.

On the other hand, a lack of subject matter jurisdiction, unlike issues which relate to the merits of a claim, is never subject to waiver or estoppel. "[S]ubject-matter

jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 625, 630 (2002). In the Fifth Circuit the Title VII employee numerosity requirement is deemed to limit the subject matter jurisdiction of the court. Thus in the Fifth Circuit, as occurred in this case, a defendant can await the outcome of the trial, and only after an adverse verdict choose to assert for the first time that it has too few employees to be covered by Title VII, and that the action thus is not within the subject matter jurisdiction of the court. This is similar to contention unsuccessfully advanced by the debtor in *Kontrick v. Ryan*, 540 U.S. 443 (2004). If the Fifth Circuit holding is correct, then a plaintiff too could utilize that tactic, waiting until the jury verdict to challenge the jurisdiction of the court.[27] Six circuits agree with the Fifth Circuit that the employee numerosity requirement is jurisdictional, and thus permit such tactics.

Whether or not a statutory element or requirement is jurisdictional can affect in several other ways the outcome of litigation. First, whether an issue is jurisdictional will at least usually control whether a court or a jury should resolve factual disputes bearing on that issue. In the instant case the plaintiff, who sought compensatory and punitive damages, had both a constitutional[28] and statutory[29] right to a jury trial on the disputed elements of that

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[27] That is precisely what occurred in *Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000).

[28] United States Constitution, Amend. VII.

[29] 42 U.S.C. § 1981a.

claim. When the defendant finally raised a dispute regarding whether it had sufficient employees to be subject to Title VII, however, the district court believed that this was a jurisdictional issue and therefore resolved the dispute itself. The district court's decision was upheld on appeal as not clearly erroneous. (App. 11, 15).[30] If, however, the employee numerosity requirement is not jurisdictional, the relevant factual disputes would have to be resolved by a jury.[31]

Second, whether or not the employee numerosity requirement is jurisdictional will often be of dispositive importance to the resolution of supplemental state law claims raised in the same action. If the plaintiff prevailed at trial on a supplemental state law claim, the later rejection of the federal claim will usually leave the state law verdict unaffected so long as the defect in the federal claim was non-jurisdictional. *See, e.g., Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000). But if the lack of employee numerosity is jurisdictional, then the court would also lack subject matter jurisdiction over the supplemental state law claim, no matter how closely

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[30] *See Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983) (holding that employee numerosity issue is jurisdictional, and remanding factual questions for resolution by the district judge).

[31] *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) (because FMLA employee numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997) (because ADEA employee numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Martin v. United Way of Erie County*, 829 F.2d 445, 451 (3d Cir. 1987) (because Title VII employee numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so).

related to the original federal claim, and the verdict on the state law claim – which itself may have had no employee numerosity requirement – would also have to be set aside.[32]

Third, if the employee numerosity requirement limits the subject matter jurisdiction of the court, the court must itself raise the issue, even if the parties agree, for example, that the employer has more than fifteen workers.[33]

> Such a holding would require a federal court to determine whether a company had fifteen employees during the relevant period, even if the parties so stipulated. To require a federal court to

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[32] *See Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1186 (2d Cir. 1996) ("Insofar as the district court previously determined that there was no original federal subject matter jurisdiction over the suit, it could not exercise supplemental jurisdiction over Nowak's state claims.") In *Nowak* the court of appeals concluded that the defect in the plaintiff's underlying ERISA claim was not jurisdictional, and that the exercise of supplemental jurisdiction was therefore permissible.

Conversely, in *Douglas v. E.G. Baldwin & Associates, Inc.*, the Sixth Circuit held that a district judge could not exercise supplemental jurisdiction over such a state claim because the lack of the requisite number of employees to support the federal FMLA claim deprived the court of subject matter jurisdiction.

If the employee numerosity requirement were jurisdictional, that would have serious implications for the timeliness of supplemental state law claims which a plaintiff sought to refile in state court after they had been dismissed by the federal court. It is unclear whether a plaintiff could invoke the tolling provision of section 1367(d) in a case in which there never had been subject matter jurisdiction over the underlying federal claim. *See Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002).

[33] The court of appeals did precisely that in *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604 (6th Cir. 1998), dismissing the action because the defendant did not have the requisite number of employees, an issue "not raised by the parties." 150 F.3d at 605.

> engage in such a fact-intensive inquiry *sua sponte* – which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets – appears to be a waste of scarce judicial resources. . . .

Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 83 (3d Cir. 2003), *cert. denied*, 124 Sup. Ct. 1714 (2004).[34]

Fourth, if the employee numerosity requirement were indeed jurisdictional, courts would be obligated to first consider and resolve this sometimes factually complex issue, even though other less difficult grounds for decision on the merits might be evident.

> To hold the requirement jurisdictional also implies that a court would need to decide whether an entity employed more than fifteen individuals before reaching a Title VII action's merits – even if the merits were more easily resolved than the "jurisdictional" question.

Nesbit v. Gears Unlimited, Inc., 347 F.3d at 83.

By conflating the elements of a federal claim with the subject matter jurisdiction of the federal courts, the decision of the Fifth Circuit poses a serious threat to the efficient and predictable conduct of civil litigation. By permitting a defendant in this case to postpone raising its possible employee-numerosity defense until after the jury verdict, the court of appeals has invited defendants, and

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[34] *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998) ("Surely the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail.")

plaintiffs, to use the same tactic in any of the six circuits that treat the employee-numerosity requirement as jurisdictional. The district court below, although bound by Fifth Circuit precedent, properly objected that allowing this tactic would be "unfair and a waste of judicial resources." (App. 47). Certiorari should be granted to address this important problem.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS,
For the Fifth Circuit.

No. 03-30365

JENIFER ARBAUGH,

Plaintiff-Appellant,

VERSUS

Y&H CORPORATION, doing business as The Moonlight Café; and YALCIN HATIPOGLU,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed August 2, 2004)

Before EMILIO M. GARZA, DeMOSS and CLEMENT, Circuit Judges.*

DeMOSS, Circuit Judge:

Jenifer Arbaugh filed suit against Y&H Corporation ("Y&H") and Yalcin Hatipoglu (collectively, "Defendants"), in November 2001, asserting claims under both Title VII of the Civil Rights Act of 1964 and Louisiana state tort law. After a two-day jury trial in October 2002, a verdict was returned in favor of Arbaugh. In November 2002, Defendants

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* Emilio M. Garza, Circuit Judge, concurring in the judgment only.

filed a motion to dismiss, contending that Y&H did not qualify as an "employer" under 42 U.S.C. § 2000e(b) because it did not employ 15 or more employees for 20 or more calendar weeks during the relevant time period. The district court ordered both parties to conduct post-trial discovery on the issue. In March 2003, the district court converted the motion to dismiss to a motion for summary judgment. Thereafter, in April 2003, the district court entered an order vacating and reversing Arbaugh's jury verdict and judgment based upon the determination that the court did not have subject matter jurisdiction. Arbaugh filed a timely notice of appeal.

BACKGROUND AND PROCEDURAL HISTORY

Jenifer Arbaugh was employed as a bartender and waitress at the Moonlight Cafe, a New Orleans restaurant, from May 2000 until February 2001. During this time, Arbaugh alleges that Hatipoglu, one of Y&H's owners, continually subjected her to a sexually hostile environment. On November 8, 2001, Arbaugh filed suit in federal district court, in Louisiana, asserting claims against Y&H (the operator of the Moonlight Café) and Hatipoglu. Arbaugh alleged sexual harassment in violation of Title VII in addition to state tort law claims. Arbaugh asserted in her complaint that the court had subject matter jurisdiction over her Title VII claim pursuant to 28 U.S.C. § 1331, which confers federal question jurisdiction.[1] Arbaugh further stated in her complaint that she had satisfied the Title VII prerequisite for filing a charge with the

[1] Arbaugh also averred that the court had supplemental jurisdiction over her state law claims pursuant to 28 U.S.C. § 1367.

Equal Employment Opportunity Commission ("EEOC") and received a "Right to Sue" notice less than 90 days prior to filing her suit in district court.

The parties consented to have the matter heard before a magistrate judge pursuant to 28 U.S.C. § 636(c).[2] Over the course of two days in October 2002, the parties presented evidence to a jury. The jury returned a verdict in favor of Arbaugh, awarding her $5000 in back-pay, $5000 in compensatory damages, and $30,000 in punitive damages. The district court entered final judgment for Arbaugh on November 5, 2002. On November 19, 2002, Defendants filed a motion pursuant to Fed. R. Civ. P. 12(h)(3), in which they sought to dismiss the case for lack of subject matter jurisdiction. Specifically, Defendants argued that during the relevant years Arbaugh was employed there, the Moonlight Cafe did not employ 15 or more employees for 20 calendar weeks, thus exempting it from Title VII coverage. In March 2003, the district court converted Defendants' motion to dismiss to a motion for summary judgment and ordered both parties to conduct additional post-trial discovery and submit supplemental memoranda to support their respective positions.

On April 4, 2003, the district court granted Defendants' motion and vacated and reversed Arbaugh's jury verdict and judgment. In its order and reasons, the district court determined that Defendants did not employ the requisite 15 or more persons during the relevant time periods, explaining that this calculation was exclusive of Y&H's delivery drivers, the two owners of Y&H, and their

[2] This opinion will refer to the magistrate judge as the district court and her rulings as decisions issued by the district court.

wives. The district court noted in its order that had the delivery drivers, the two owners, or their wives counted as employees, Defendants would have been subject to the statutory framework of Title VII. Arbaugh timely filed the instant appeal.

STANDARD OF REVIEW

We review dismissals for lack of subject matter jurisdiction *de novo*, using the same standards as those employed by the lower court. *Beall v. United States*, 336 F.3d 419, 421 (5th Cir. 2003); *McAllister v. FDIC*, 87 F.3d 762, 765 (5th Cir. 1996). We must take as true all of the complaint's uncontroverted factual allegations. *John Corp. v. City of Houston*, 214 F.3d 573, 576 (5th Cir. 2000). Likewise, this court reviews grants of summary judgment *de novo*, applying the same standard as the district court. *Tango Transp. v. Healthcare Fin. Servs. LLC*, 322 F.3d 888, 890 (5th Cir. 2003). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court views the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). The non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the non-movant "fails to make a showing sufficient to establish the existence of

an element essential to that party's case." *Celotex,* 477 U.S. at 322.

DISCUSSION

I. Whether the district court erred in ruling that the number of Defendants' employees determined subject matter jurisdiction rather than an issue going to the merits.

Arbaugh argues that the threshold issue is not whether Y&H employed 15 or more employees during the relevant time period, but rather whether the employee census finding is relevant to subject matter jurisdiction or whether that determination goes to the merits of the case. Arbaugh argues that while the Fifth Circuit has concluded this issue determines subject matter jurisdiction, this court's rulings do not provide an explanation supporting its conclusion.

Noting a circuit split on this issue, Arbaugh cites the Second Circuit for its observation that:

> Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question. Court decisions often obscure the issue by stating that the court is dismissing "for lack of jurisdiction" when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.

Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000).

Arbaugh relies also on the Seventh Circuit's determination that a plaintiff who files a non-frivolous suit in

federal court without more imparts the court with subject matter jurisdiction. *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998), *abrogated on other grounds, Papa v. Katy Indus., Inc.*, 166 F.3d 937, 939-40 (7th Cir. 1999). Finding that "[a] plaintiff's inability to demonstrate that the defendant has 15 or more employees is just like any other failure to meet a statutory requirement," the Seventh Circuit opined: "Surely the number of employees is not the sort of question a court (including [an] appellate court) must raise on its own, which a 'jurisdictional' characterization would entail." *Sharpe,* 148 F.3d at 677-78. Arbaugh contends that because she presented to the district court a non-frivolous claim based in part on federal law, without demonstrating anything more, this court is vested with subject matter jurisdiction.[3] Arbaugh suggests that because this court has not examined the census/jurisdiction issue sufficiently, we should adopt the well-reasoned approach that the Second, Seventh, and Federal Circuits have followed, and likewise conclude that

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[3] Arbaugh also raises judicial economy considerations, noting that the lack of subject matter jurisdiction may be raised at any time, even after a trial on the merits has concluded. She asserts that not only does this circumstance create a waste of judicial resources, but it also presents a situation where a plaintiff's state law claims may be time-barred.

In *Jinks v. Richland County, S.C.*, 538 U.S. 456, 462-65 (2003), however, the Supreme Court recently confirmed the constitutionality of 28 U.S.C. § 1367(d), which provides that state law claims before a federal court pursuant to supplemental jurisdiction are tolled during the pendency of the federal suit. *See* 28 U.S.C. § 1367(d)(2000). Specifically, section 1367(d) declares that such state law claims "shall be tolled while the [federal] claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." *Id.* § 1367(d).

the census issue goes to the merits of an employment discrimination case.

Defendants, on the other hand, simply argue that we must adhere to our Circuit precedent, established in *Dumas v. Town of Mt. Vernon,* 612 F.2d 974, 980 (5th Cir. 1980), and followed by *Womble v. Bhangu,* 864 F.2d 1212, 1213 (5th Cir. 1989), and *Greenlees v. Eidenmuller Enters., Inc.,* 32 F.3d 197, 198 (5th Cir. 1994), that a failure to qualify as an "employer" under Title VII deprives a district court of subject matter jurisdiction. Defendants contend that while the Second, Seventh, and Federal Circuits view the statutory definition of an employer as an issue which goes to the merits of the case, the Fifth Circuit is joined by five other circuits in concluding otherwise. Specifically, the Fourth, *Hukill v. Auto Care, Inc.,* 192 F.3d 437, 441-42 (4th Cir. 1999), the Sixth, *Armbruster v. Quinn,* 711 F.2d 1332, 1335 (6th Cir. 1983), the Ninth, *Childs v. Local 18, Int'l Bhd. of Elec. Workers,* 719 F.2d 1379, 1382 (9th Cir. 1983), the Tenth, *Owens v. Rush,* 636 F.2d 283, 287 (10th Cir. 1980), and the Eleventh Circuit, *Scarfo v. Ginsberg,* 175 F.3d 957, 960 (11th Cir. 1999), have all concluded that the "employer" definition creates a jurisdictional requirement.

In an attempt to circumvent the *Dumas/Womble/Greenlees* line of cases, Arbaugh cites *Clark v. Tarrant County, Texas,* 798 F.2d 736, 741-42 (5th Cir. 1986), in which this court held that where questions concerning subject matter jurisdiction are intertwined with the merits, a Title VII claim should not be dismissed for lack of subject matter jurisdiction unless the claim is frivolous or clearly excluded by prior law. In *Clark,* the district court granted the defendants' motion for summary judgment, finding that the plaintiffs' employment positions came within the personal staff exemption of Title VII, thus

nullifying the claim. *Id.* at 740. In reversing the district court, the *Clark* court first determined that subject matter jurisdiction and the merits are "considered intertwined where the statute provides both the basis of federal court subject matter jurisdiction and the cause of action." *Id.* at 742 (citing *Sun Valley Gas. v. Ernst Enters., Inc.,* 711 F.2d 138, 139 (9th Cir. 1983)). The court in *Clark* concluded:

> The determination of whether appellants come within an exception of Title VII is intertwined with the merits of the Title VII claim. Where the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, and assuming that the plaintiff's federal claim is neither insubstantial, frivolous, nor made solely for the purpose of obtaining jurisdiction, the district court should find that it has jurisdiction over the case and deal with the defendant's challenge as an attack on the merits.

Id. (citation omitted).

However, we find the holding in *Clark* not to be controlling. *Clark* was decided in 1986, approximately six years after this court had previously issued its opinion in *Dumas. Dumas* involved a determination of, *inter alia,* whether the defendants satisfied the statutory definition of an "employer," thus establishing a basis for liability under Title VII. 612 F.2d at 979-80. After finding that the defendants did not employ the requisite number of employees during the relevant time periods, the *Dumas* court held that "dismissal of the Title VII claims against [defendants] for lack of subject matter jurisdiction was proper." *Id.* at 980.

Because we are bound by our prior precedent, Arbaugh's argument that the census issue is not jurisdictional

must fail. *See United States v. Lee*, 310 F.3d 787, 789 (5th Cir. 2002) (citing *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001)) ("[A] panel of this court can only overrule a prior panel decision if 'such overruling is unequivocally directed by controlling Supreme Court precedent.'" (citation omitted)). We must adhere to the well-established rule that "in the absence of a clearer statement by the Supreme Court or en banc reconsideration of the issue, this panel is bound by circuit precedent." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 n.3 (5th Cir. 1998); *see also Gandy v. State of Ala.*, 569 F.2d 1318, 1325 n.11 (5th Cir. 1978) ("This panel is bound by a prior panel's decision in the absence of intervening en banc reconsideration or Supreme Court precedent.") (citation omitted). To the extent that *Clark* conflicts with our long-standing precedent first enunciated in *Dumas*, it is not binding precedent in this Circuit.[4] Under our prior precedent rule, "[o]ne panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the Court en banc can do this." *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). Because the precise issue before us was decided in *Dumas* six years before *Clark*, and because *Clark* was neither a Supreme Court case nor an en banc decision, we are bound by the holding in *Dumas* that the employee census finding is determinative of subject matter jurisdiction.

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[4] We observe that no court in this or any other circuit has cited *Clark* for the proposition that Arbaugh seeks this court to adopt here.

II. Whether the district court erred in ruling that Defendants employed fewer than 15 employees.

Having concluded that the employee census issue is determinative of subject matter jurisdiction, we shift our analysis to whether Defendants employed the requisite number of employees during the relevant time periods. Arbaugh argues that the jury's verdict should be reinstated because Y&H did in fact employ 15 or more employees during 2000 and 2001, maintaining that the delivery drivers, the owners of Y&H, and their wives were Y&H's employees.

1. The Drivers

Arbaugh contends that the district court erred in concluding that the delivery drivers were not "employees" as defined by Title VII. Arbaugh first directs us to evidence she presented to the district court concerning the work schedules created by Defendants in which the drivers were assigned schedules identical to those maintained for other employees at the restaurant, *i.e.,* the kitchen and restaurant staff. Arbaugh notes that the drivers were paid $4.00 per hour and were expected to work all of the hours in their respective shifts. In addition, Arbaugh argues that the drivers, like all other employees, used Defendants' computer to record the beginning and end of their shifts. She also presented evidence that Defendants prohibited the drivers from performing work for any other employer during their shifts, regardless of whether there were orders to be delivered. Arbaugh points to evidence suggesting that when drivers were not delivering orders, they were required to perform other work at the restaurant, which included, *inter alia,* cleaning, replenishing condiments, and helping prepare salads and desserts to be

included in home deliveries. Arbaugh concedes that the drivers did not appear on the payroll records nor did they have the proper tax deductions taken from their wages.

Defendants maintain that the drivers who delivered food for Y&H were not "employees" for Title VII purposes, but rather independent contractors. In support of their argument, Defendants cite *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986), and the "economic realities" test enunciated therein for determining whether an individual is an employee under Title VII.

While we review a district court's findings of fact for clear error, we review a district court's ultimate determination of employee status *de novo*. *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993). We first observe that Title VII defines an "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (2000) (pending legislation). Recognizing the circularity in such a definition, the Supreme Court explained that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (citations and quotations omitted). The Fifth Circuit has recognized that "whether a person is an employee under Title VII is a question of federal law . . . to be ascertained through consideration of the statutory language of the [Civil Rights] Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Broussard*, 789 F.2d at 1159-60 (citation and quotations omitted).

It is well-settled in this Circuit that we determine whether a plaintiff is an "employee" for Title VII purposes by applying the hybrid economic realities/common law control test first advanced in *Spirides v. Reinhardt,* 613 F.2d 826, 831 (D.C. Cir. 1979), and first adopted by this Court in *Mares v. Marsh,* 777 F.2d 1066, 1067-68 (5th Cir. 1985). *See also Broussard,* 789 F.2d at 1160. Although other factors are relevant, the most important factor is "the extent of the employer's right to control the 'means and manner' of the worker's performance." *Bloom v. Bexar County, Tex.,* 130 F.3d 722, 726 (5th Cir. 1997) (citation omitted); *see also Broussard,* 789 F.2d at 1160. The factors pertinent to this inquiry include: (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of the job commitment; (7) form of payment; and (8) directions on schedules and on performing work. *Broussard,* 789 F.2d at 1160.

Citing the above factors, the district court found that all eight factors weighed against a finding of control by Y&H. We agree. We begin our review by noting that the parties do not dispute that the first four *Broussard* factors support Defendants' contention that Y&H did not exercise control over the delivery drivers. Specifically, all of the drivers owned their own vehicles necessary to make the deliveries for Y&H. The drivers were responsible for all operating costs and for license fees and taxes, as well as for obtaining and maintaining the proper insurance for their vehicles. In addition, all drivers provided for the

maintenance and operating supplies associated with the care of their vehicles.

With regard to the drivers' ability to influence their profits, there was testimony elicited at trial revealing that the drivers were given at least two incentives to maximize the number of deliveries they made, thereby increasing their income: an incentive bonus based on the total dollar value of all deliveries made during their shifts and the income from tips, of which they received 100%.[5] Therefore, the more deliveries a driver made during a shift, the more money they could potentially earn, thus enabling the driver to maximize their profits.

As for the length of the job commitment, the *Broussard* court concluded the plaintiffs were not employees, finding it persuasive that the plaintiffs worked "off and on" for a year and that they also worked for nine other companies during this time. 789 F.2d at 1160. While the parties do not dispute that the drivers were expected to work all of the hours in their respective shifts, there is no evidence that the drivers were prohibited from working elsewhere when not on duty at Y&H. At trial, testimony was presented indicating that some of the drivers in fact worked other jobs.

With respect to the form of payment, the drivers were paid $4.00 per hour and retained 100% of the tips they received while making deliveries. Most drivers earned the majority of their income from tips. For tax purposes, the drivers were issued a Form 1099, as opposed to a Form W-2,

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[5] The drivers were also able to influence their profits by controlling the expenses associated with the vehicle they chose to drive and the amount they chose to spend on operation and maintenance.

which the kitchen and restaurant staff received. While Y&H withheld the appropriate federal and state income taxes and paid social security taxes on its kitchen and restaurant staff, it did not do so with its delivery drivers.

The parties presented the district court with conflicting evidence as to the direction Y&H provided the drivers as to both their schedules and the performance of their duties. Arbaugh maintained that Y&H, without input from the drivers, assigned the drivers to specific work schedules which were identical to the schedules it had for other employees. For purposes of establishing that Defendants exercised control over the performance of the drivers' duties, Arbaugh submitted evidence that: (1) the drivers used Y&H's computer to record the start and finish times for their shifts; (2) Defendants required the drivers to work solely for them during the entirety of the their shifts regardless of whether there were orders to deliver; (3) the drivers were responsible for preparing condiments and salads to be included in the orders that came into the restaurant; and (4) the drivers were required to clean their work stations at the end of their shifts.

Conversely, Defendants contend that the schedule making was a collaborative effort between Y&H and the drivers. Defendants insist that the drivers would inform Y&H of the days and times they could work, and based on that information, work schedules for the drivers were prepared and posted. With respect to the control Y&H had over the drivers' performance, Defendants concede the four points raised above by Arbaugh, but insist that: (1) during slow periods the drivers would watch television; (2) the drivers never waited on customers in the restaurant or performed any other duties to assist in the operation of the restaurant; (3) once a driver picked up an order from the

kitchen for delivery, it was the driver's responsibility to determine the route and manner of delivery; and (4) neither Hatipoglu nor Khaleghi supervised the drivers while they made their deliveries.

The district court concluded that, even taking as true Arbaugh's version of the facts concerning the setting of the schedules, the evidence failed to demonstrate that Y&H exercised the requisite control over its delivery drivers. Specifically, the district court found that Arbaugh "misunderstands the control factor," citing both *Broussard* and *Cole v. Venture Transport, Inc.*, 2000 WL 335743 (E.D. La. Mar.30, 2000), in support of its conclusion. In *Cole*, the district court found the plaintiff, who contracted with the defendant to provide motor carrier transport to the defendant's customers, was not an employee of the defendant, concluding:

> Last, and most important, although Venture directed when and where plaintiff picked up and delivered cargo, plaintiff alone controlled the manner and means in which she performed her work, including the method of transport, the operation of her vehicle, the route selected, and the selection, hiring and firing of drivers.

2000 WL 335743, at *4. Likewise, in *Broussard*, this court responded to a truck driver's allegation that she was an employee because of the extensive direction she received in terms of what to do and when to do it, by stating, "[s]he misses the point: she does not really claim direction on how to *operate* her truck." 789 F.2d at 1160 (emphasis added).

We agree with the district court. Reviewing the district court's factual findings for clear error, we conclude

that the district court engaged in a thoughtful, well-reasoned analysis in determining that because the drivers controlled the manner and means by which they operated their vehicles and selected their routes, Y&H did not exercise a right of control over the drivers' performance.

This Circuit has also recognized the additional factors identified in *Spirides* that are relevant to this inquiry, including:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer;" (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Broussard, 789 F.2d at 1160 (quoting *Spirides,* 613 F.2d at 832). The district court cites all *Spirides* factors as supporting its conclusion that the drivers were not employees of Y&H. Again, we agree.

It is clear that at least four of these factors weigh heavily against a finding that the delivery drivers are employees, including the fact that: (1) Y&H did not provide the equipment used by the delivery drivers; (2) the

delivery drivers did not receive annual leave; (3) the delivery drivers did not accumulate retirement benefits; and (4) Y&H did not pay the drivers' social security taxes. Also, as mentioned in our discussion of the *Broussard* factors, there was insufficient evidence in the record establishing that the delivery drivers operated under the direction of a supervisor or that the method of payment was indicative of an employer-employee relationship.

While it may be questionable as to whether any particular "skill" is required in making the deliveries, this factor alone is not dispositive. In addition, although the record demonstrates that each party was capable of terminating the working relationship, we find this determination to be inconclusive. Finally, as to the intention of the parties, the record is void of any type of employment agreement defining the relationship between Y&H and the delivery drivers. In the absence of such documentation, we look to the conduct of the parties in determining their common intent. The parties' relevant conduct reveals Y&H's non-withholding of taxes, its non-payment of social security taxes, the drivers' retention of the tips they earned, and the drivers' payment of their automobile expenses, including mileage. This evidence clearly supports the position that the parties did not intend for there to be an employer-employee relationship.

In sum, determining whether an individual is an "employee" for Title VII purposes is a fact-intensive inquiry, and as with most employee-status cases, there are facts pointing in both directions. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 305 (5th Cir. 1998) (quotations omitted). However, in the instant case, we are persuaded that the great majority of facts in the record support the conclusion that the delivery drivers

were not employees of Y&H. Consequently, unless Y&H's owners or their wives are found to be employees, Y&H did not employ 15 or more employees during the relevant time periods as required for establishing liability under Title VII.

2. The Owners and Their Wives[6]

Arbaugh argues that the owners' wives should be counted as "employees" under Title VII, suggesting that the manner in which they were treated by Y&H is evidence of the alleged employer-employee relationship. Specifically, Arbaugh contends that this evidence includes the fact that the wives: (1) received a salary for their "advertising and publicity" work on behalf of the restaurant; (2) were included on the payroll register; and (3) had the proper taxes deducted from their wages. Arbaugh maintains that because the wives performed services for Y&H and were compensated for those services, the district court erred in not counting them as employees. Defendants respond by insisting that the wives, along with their husbands, *are* the owners of Y&H. As such, Defendants argue that the wives cannot be counted as employees in light of Supreme Court's recent decision in *Clackamas Gastroenterology Associates., P.C. v. Wells,* 538 U.S. 440 (2003).

[6] Arbaugh concedes that the Supreme Court's recent decision in *Clackamas Gastroenterology Associates., P.C. v. Wells,* 538 U.S. 440, 449-51 (2003), in which it was determined that director-shareholders of a medical clinic are not "employees" under the Americans with Disabilities Act, strongly suggests that Hatipoglu and Khaleghi themselves are not "employees." As such, Arbaugh focuses her appeal on the owners' wives.

In *Clackamas,* decided after the district court issued its order dismissing Arbaugh's suit, the Supreme Court was faced with whether, in the context of a discrimination suit filed against a medical clinic, the director-shareholder physicians could be counted as employees for purposes of determining whether the professional corporation was subject to the Americans with Disabilities Act. *Id.* at 442. The Court adopted the following six-factor inquiry advanced by the EEOC as to whether a director-shareholder is an employee:

> [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> [2] Whether and, if so, to what extent the organization supervises the individual's work;
>
> [3] Whether the individual reports to someone higher in the organization;
>
> [4] Whether and, if so, to what extent the individual is able to influence the organization;
>
> [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
>
> [6] Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50 (quotations and citation omitted). The Court recognized that whether a director-shareholder is an employee "depends on all of the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451 (internal quotation marks and citation omitted).

In its ruling, the district court, without the guidance of *Clackamas,* observed again that this Circuit has adopted the economic realities test to resolve whether a person is an employee for purposes of Title VII. It was deduced that this Circuit would look to the same test to determine whether a person is a partner or an employee of a corporation. The district court first concluded that Hatipoglu and Khaleghi themselves were not employees for Title VII purposes. It found that Hatipoglu and Khaleghi were partners who divided the profits and the responsibilities of running the business equally. The district court also found convincing Defendants' argument that no one other than themselves had control over all aspects of the business.

With regard to the two wives, the district court observed that neither did any work at the restaurant. The only services recognized by the district court were the occasional advertising and promotional work they performed. The district court determined that in applying all the factors of the economic realities test, the only one favoring a finding of an employment relationship was that social security taxes were paid on their income from the business. The district court therefore concluded that the wives were passive partners rather than employees.

Applying the six-factor test established in *Clackamas* to the facts in the instant case, we conclude that the district court ultimately reached the correct result, albeit based on different reasoning. First, it is unlikely that Y&H could hire or fire any of these four individuals. Instead, Hatipoglu, Khaleghi, and their respective wives are partners who, if it was decided that the working relationship was unpalatable, would have to engage in a dissolution process in accordance with the corporate structure

under which they were originally organized.[7] Second, there is no evidence demonstrating that the wives were supervised in their advertising and promotional work, nor is there any indication that they reported to anyone higher in the organization.

There is no evidence in the record as to whether either wife had any influence over Y&H's operations. With regard to the intention of the parties, the wives were not designated as employees either in written agreements or contracts. In fact, there is no record evidence evincing any intended nature or scope of employment. Finally, the record clearly establishes that the wives, along with their husbands, shared alike in Y&H's profits, losses, and liabilities.

As such, although the district court did not have the direction provided by *Clackamas* at the time it issued its order, we conclude that the district court nevertheless properly determined that Hatipoglu, Khaleghi, and their respective wives should not be counted as employees for purposes of determining Title VII liability.

CONCLUSION

Having carefully reviewed the record of this case, the parties' respective briefing and arguments, and for the reasons set forth above, we find the district court properly followed our Circuit precedent in concluding that the number of employees determines a court's subject matter jurisdiction in a suit filed pursuant to Title VII. Second, the district court correctly concluded that neither the

[7] Y&H was organized as a Subchapter S corporation.

delivery drivers, nor the owners of Y&H, nor their wives should be counted as employees. While the district court's conclusion with regard to the owners and their wives was based on the economic realities test, the same conclusion is reached pursuant to the six-factor inquiry recently announced by the Supreme Court in *Clackamas*. Because it is undisputed that Y&H did not employ the requisite 15 employees without the inclusion of the drivers, the owners, or their wives, Defendants are not subject to liability under Title VII, and thus the district court properly dismissed Arbaugh's suit for lack of subject matter jurisdiction.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JENIFER ARBAUGH	CIVIL ACTION
VERSUS	NO: 01-3376
Y & H CORPORATION, et al	SECTION: "R"(1)

JUDGMENT

(Filed Apr. 3, 2003)

Considering the order and reasons this date,

IT IS ORDERED that the judgment of November 4, 2002 in favor of the plaintiff, Jenifer Arbaugh, and against the defendants, Y&H Corporation and Yalcin Hatipoglu (Rec. doc. 38), is VACATED.

IT IS FURTHER ORDERED that the [sic] there be judgment in favor of the defendants and against the plaintiff DISMISSING WITH PREJUDICE her claims pursuant to Title VII and DISMISSING WITHOUT PREJUDICE her claims pursuant to Louisiana law, with the parties to bear their own costs.

New Orleans, Louisiana, this 2 day of April, 2003.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JENIFER ARBAUGH	CIVIL ACTION
VERSUS	NO: 01-3376
Y&H CORPORATION, et al	SECTION: "R"(1)

ORDER AND REASONS

(Filed Apr. 3, 2003)

Before the undersigned is the motion of the defendants, Y&H Corporation ("Y&H"), the operator of the Moonlight Café, and Yalcin Hatipoglu ("Hatipoglu"), one of Y&H's shareholders, to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(h)(3). The motion was converted to a motion for summary judgment, pursuant to Fed. R. Civ. P. 56. For the following reasons, the motion is granted.

PROCEDURAL BACKGROUND

The plaintiff, Jennifer Arbaugh ("Arbaugh"), filed this action on November 18, 2001, asserting claims under Title VII and Louisiana law. Arbaugh alleged that during her employment at the Moonlight Café, as a bartender and waitress, she was discriminated against because of her sex in that she was exposed to a hostile working environment and that in February, 2001, she was forced to resign because of the actions of Hatipoglu. Rec. doc. 1. The parties consented to trial before a Magistrate Judge. Rec. doc. 6. The action was tried before a jury on October 28 and 29, 2002, and there was a verdict for Arbaugh. Rec. docs. 33 and 36. A judgment was entered in favor of Arbaugh and against the defendants. Rec. doc. 38.

On November 19, 2002, the defendants filed the motion to dismiss contending that Y&H does not qualify as an "employer" under 42 U.S.C. § 2000e(b). Specifically, Y&H argues that it did not employ fifteen or more employees for twenty or more calendar weeks in either 2000 or 2001. On December 26, 2002, the court rejected Arbaugh's contentions that the motion be denied because the defendants admitted subject matter jurisdiction was present. Rec. doc. 56. Because the burden was on Arbaugh to show that subject matter jurisdiction was present, she was given an opportunity to conduct discovery. *Id.* The parties completed the discovery and filed supplemental memoranda with exhibits on the jurisdictional issues. Rec. docs. 57 and 58.

The parties submitted: (1) affidavits from Hatipoglu and Hassan Khaleghi, both shareholders of Y&H; (2) Y&H's payroll records for 2000 and 2001; (3) Y&H work schedules for delivery drivers for January 29 through February 18 for an unidentified year; (4) Y&H schedules for the persons working in the kitchen and waiting tables; (4) affidavits from Sharon Davidson and Kevin Brown, delivery drivers for the Moonlight Café; and (5) Khaleghi's deposition. After reviewing the evidence, the court determined that additional evidence was required regarding compensation received by Hatipoglu and Khaleghi and their spouses in 2001. The parties were order [sic] to submit supplemental memoranda with evidence to resolve this issue. The parties were notified that the defendants' motion to dismiss was converted to a motion for summary judgment. Rec. doc. 59. Arbaugh and the defendants submitted supplemental memoranda. Rec. docs. 60 and 61. Arbaugh submitted an affidavit from Mark Brown, a former delivery driver for Y&H, the W-2 forms for 2001 for

Hatipoglu, Khaleghi and their spouses and their 2001 income tax returns. Rec. doc. 60. The defendants also submitted the W-2 forms and income tax returns for 2001 with an affidavit from Khaleghi.

STATEMENT OF THE ISSUES

For purposes of this action, Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person." 42 U.S.C. § 2000e(b). The parties agree that the years 2000 and 2001 are the relevant time frame.

> The payroll method is the test used to determine whether an entity meets the requisite employees to qualify as an employer under Title VII. Under this test, all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. . . . What is ultimately critical is the existence of an employment relationship, as is most readily demonstrated by an individual's appearance on the employee's payroll. An employee who works irregular hours, perhaps only a few days a month, will be counted. Thus, some part-time workers may be counted as employees. On the other hand, an individual who appears on the payroll but is not an employee under traditional principles of agency law . . . would not count.

Taylor v. Eastside Auto, Truck and Tire Repair, 2001 WL 214032, *2 (E.D.La.) (Africk, M.J.) (citations, quotation marks and brackets omitted). The defendants contend that Y&H's payroll journals for 2000 and 2001 demonstrate

that it did not employ fifteen or more employees for twenty or more calendar weeks in either 2000 or 2001. Arbaugh replies that the defendants failed to count the drivers, who made deliveries for the restaurant, and the owners of Y&H, Hatipoglu and Khaleghi and their spouses.

UNDISPUTED FACTS

In 1996, Hatipoglu and Khaleghi organized Y&H as a Louisiana corporation under Subchapter S of the Internal Revenue Code. Hatipoglu and Khaleghi are the only officers and directors of the corporation. Hatipoglu, Khaleghi and their spouses are the only shareholders. Exhibits A and B to Rec. doc. 44. Y&H's only activity is the operation of the Moonlight Café. Rec. doc. 58 at Exhibit D at 5.

The Y&H payroll journals reflect that it did not employ fifteen or more persons, exclusive of the delivery drivers and the four owners, for twenty or more calendar weeks in either 2000 or 2001.[1] If either the delivery drivers or the four owners are counted with the persons shown on the payroll journals, then Y&H employed fifteen or more persons for the requisite time. Exhibit C to Rec. doc. 44.

The amount paid by Y&H to Hatipoglu, Khaleghi and their spouses in calendar year 2000 totaled $60,000 per

[1] There were four weeks in calendar year 2000 where Y&H had sixteen employees, exclusive of the drivers and the shareholders. For the remaining weeks of 2000 Y&H employed between eight and fourteen persons. In 2001, Y&H employed as many as nine persons and as few as three persons, exclusive of the drivers and the shareholders. Exhibit C to Rec. doc. 44.

couple.[2] This was paid to them biweekly, except for the biweekly periods ending on July 30 and August 13, 2000. Exhibit C to Rec. doc. 44. In calendar year 2001, the couples each received $29,117. Their tax returns listed $2,500 of this income as wages and the remainder was reported as income from a subchapter S corporation. Exhibit B-2 at Rec. doc. 61. In calendar year 2001, Lisa Hatipoglu also received $21,464 in wages from the Orleans Parish School Board. *Id.*

Khaleghi describes himself and Hatipoglu as partners in Y&H. Rec. doc. 58 at Exhibit D at 5. During the applicable years, they managed the restaurant and did whatever was required to keep it going. *Id.* at 6. For example, Hatipoglu and Khaleghi sometimes worked as delivery drivers. Rec. doc. 57 at Exhibit C. They generally worked alternate days at the restaurant unless the demands of the business required them both to be present. Rec. doc. 58 at Exhibit D at 6. The sole source of their income was the restaurant. *Id.* at 6-7. Lisa Hatipoglu and Zoreh Khaleghi did not work at the restaurant, but they occasionally did advertising and promotion work. *Id.* at 19-20. The compensation that the spouses received was not determined based on the time they worked on advertising and promotion. They received their compensation regardless of whether they did advertising or promotion work in a given pay period. *Id.* at 22. The purpose of the compensation was to allow them to be eligible for Social Security benefits. *Id.* at 22-23. On their 2001 income tax returns the payments

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[2] Tax returns for that year were not produced. It is assumed, based on a review of the payroll records, that all income was reported as wages rather than income from the Subchapter S corporation.

to the spouses were reported as wages. Exhibit B-2 at Rec. doc. 61.

The delivery drivers owned their vehicles and were responsible for: (1) all maintenance and operating costs, including insurance, for their vehicles; and (2) taxes, licenses and fees associated with their vehicles and their ability to drive. Rec. doc. 58 at Exhibits A-C. Y&H did not provide the delivery drivers with any annual leave or retirement benefits. *Id.* Y&H did not pay Social Security taxes for the delivery drivers. *Id.* The delivery drivers were paid $4.00 per hour plus an incentive payment for the value of the deliveries plus tips. Most of their income was derived from tips. Rec. doc. 58 at Exhibit C and Exhibit D at 14. There was no tip pool, so all tips paid to an individual driver were retained by that driver. Rec. doc. 58 at Exhibit D at 14. The drivers were issued a Form 1099 rather than a Form W2. *Id.* at 15. The kitchen and restaurant staff had federal and state income taxes withheld and Social Security taxes were paid on their wages. Rec. doc. 44 at Exhibit C.

Some of drivers worked other jobs and some did not. *Id.* at 11 and Exhibit A to Rec. doc. 60. How the schedules for the drivers was established is disputed. The affidavits of Hatipoglu and Khaleghi state that the drivers informed them of the days and times they could work and, based on that information, work schedules for the drivers were prepared and posted. Rec. doc. 57 at Exhibit A at 11. This is supported by the affidavit from Kevin Brown. Rec. doc. 58 at Exhibit C. This is contradicted by the affidavit of Mark Brown who states that the schedules were prepared by Y&H without input from the drivers. Rec. doc. 60 at Exhibit A. There is no dispute as to what occurred after a schedule was prepared. Once it was posted for the week,

the drivers were expected to work at the times shown on the schedule. *Id.* at 11 and Rec. doc. 57 at Exhibit C.

When the drivers arrived and departed they punched in or out on a time clock on the computer that was used to determine their hourly pay. *Id.* at 15. When they arrived, they prepared containers of condiments for the food they would be delivering. *Id.* at 9. One driver stated that the drivers also helped to prepare salads and deserts that were included in the home deliveries. Rec. doc. 57 at Exhibit C. At the end of a scheduled shift, they cleaned the station they used during that shift. Rec. doc. 58 at Exhibit D at 10. During the assigned shifts the drivers were assigned orders for delivery in turn. *Id.* at 12. During slow periods the drivers watched television, sat and waited, or prepared condiments for the next wave of orders. *Id.* at 12-13. The drivers never waited on customers in the restaurant or performed any other duties to assist in the operation of the restaurant. *Id.* at 13-14. Although most of the drivers had other jobs, they were only permitted to work as delivery drivers for Y&H during their scheduled shifts. *Id.* at 11 and Rec. doc. 57 at Exhibit C. Mark Brown testified that he and other drivers worked between 50 and 60 hours per week. Rec. doc. 60 at Exhibit A. Once a driver picked up an order from the kitchen for delivery it was the driver's responsibility to determine the route and manner of the delivery. Hatipoglu and Khaleghi did not supervise the drivers while they were making their deliveries. Rec. doc. 58 at Exhibit C. The drivers understood that if they did not properly perform their duties, their services would be terminated. Rec. doc. 57 at Exhibit C.

SUMMARY JUDGMENT STANDARD

Fed. R. Civ. P. 56 provides in pertinent part that summary judgment will be granted when " . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2552 (1986). *Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3189 (1990). To that end, the court must "view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Ameristar Jet Charter v. Signal Composites,* 271 F.3d 624, 626 (5th Cir. 2001). Where the record taken as whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S. Ct. 1348, 1356 (1986); *Washington v. Allstate Ins. Co.,* 901 F.2d 1281 (5th Cir. 1990).

The parties were ordered to identify any material fact concerning subject matter jurisdiction that they contend is in dispute. Rec. doc. 59. Arbaugh states that there are disputed issues of fact, but has failed to identify them. Rec. doc. 60 at p. 4. The disputed issue of fact between the parties is their conflicting accounts of how the schedules for the drivers is prepared. The undersigned will assume, for purposes of this motion, that Arbaugh's description of the preparation of the schedules is correct. In *Clark v. Tarrant County, Texas,* 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit held:

> Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint

> supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.

Id. at 741. Here, the issue of subject matter jurisdiction will be resolved based on the complaint and the undisputed facts.

THE DELIVERY DRIVERS

In *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986), the plaintiff appealed from a dismissal of her Title VII action. The district court held that the plaintiff was not the defendant's employee for Title VII purposes. The Fifth Circuit held that the economic realities test guided the analysis of whether an individual was an employee for Title VII purposes, and the most important factor in determining employee status was the right to control. *Id.* at 1160. The Fifth Circuit identified facts pertinent to the issue of control. In *Cole v. Venture Transport, Inc.*, 2000 WL 335743 (E.D.La.) (Vance, D.J.), the *Broussard* control factors were enumerated as follows:

> The factors pertinent to this inquiry (control) are: (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of job commitment; (7) forms of payment; and (8) directions on schedules and performing work.

Id. at *3.

The undisputed facts show that the essential equipment necessary to perform the job, a motor vehicle, was owned by each driver. Each driver was also responsible for the cost of operating the vehicle and the license fees and taxes associated with it. Each driver was responsible for obtaining insurance and for the maintenance of the vehicle. Four of the eight factors weigh against a finding of control by Y&H.

The ability to influence profits rested with the drivers. The drivers were given at least two incentives to maximize the number of deliveries they made and thereby increase their income. The first was the incentive bonus based on the dollar value of deliveries made during their shifts, and the second was their income from tips. The importance of tips is shown by the fact that the drivers retained 100% of the tips they received and were not required to pool those tips for the benefit of the kitchen staff or other persons working in the restaurant. The drivers also controlled their expenses in terms of the vehicle they chose to drive and the amount they chose to spend on operation and maintenance.

The length of the job commitment also weighs in favor of a finding that control over the drivers did not rest with Y&H. In *Cole* the plaintiff agreed to provide motor carrier transport services to the defendant. Although the plaintiff worked for the defendant for four months, either party retained the right to cancel the contract without cause on thirty days notice. The District Court found that this factor weighed in favor of a determination that the plaintiff was not under the control of the defendant. Similarly, the drivers for Y&H could be terminated at any time and the drivers could quit at anytime.

The form of payment weighs against a finding of control over the drivers by Y&H. Although Y&H withheld taxes for federal and state income taxes and paid Social Security taxes on its kitchen and restaurant staff, it did not do so for its drivers.

Although Arbaugh stresses that the work schedules posted each week demonstrate control,[3] she misunderstands the control factor. In *Cole* the District Court stated:

> Last, and most important, although Venture directed when and where plaintiff picked up and delivered cargo, plaintiff alone controlled the manner and means in which she performed her work, including the method of transport, the operation of her vehicle, the route selected, and the selection and hiring of drivers.

2000 WL 335743 at *4. As in *Cole,* Y&H directed the drivers to pick up the orders at the restaurant and deliver them to customers, but the drivers controlled the manner and means in which they operated their vehicles and selected their routes. In *Broussard* the plaintiff and her husband hired themselves and their truck out to make hauls. The plaintiff pointed to extensive direction of her work in terms of what to do and when to do it. The Fifth Circuit responded that, "[s]he misses the point: she does not really claim direction on how to operate her truck." 789 F.2d at 1160. There is no contention that Y&H told the drivers how to operate their vehicles. Y&H did not exercise

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[3] Arbaugh's reliance on Louisiana law to define the relationship between Y&H and the drivers is misplaced. The court's subject matter jurisdiction rests on Arbaugh's Title VII claim. The court must look to the law applicable to a Title VII claim to determine whether subject matter jurisdiction is present.

a right of control over the drivers sufficient to make them employees under the economic realities test. *Broussard* and *Cole* demonstrate that, even if the plaintiff's version of the setting of the schedules is accepted, Y&H did not exercise control over the drivers.

In *Broussard,* the Fifth Circuit stated that, "[t]he right to control, although the most significant factor, is not alone determinative." 789 F.2d at 1160. It identified additional relevant factors which were enumerated in *Cole* as follows:

> Additional relevant factors include: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (4) whether annual leave is afforded; (5) whether the work is an integral part of the business of the "employer;" (6) whether the worker accumulates retirement benefits; (7) whether the "employer" pays social security taxes; and (8) the parties' intention.

2000 WL 335743 at *3. It is undisputed that four of these weigh against a finding of employee status: (1) termination of work relationship; (2) annual leave; (3) retirement benefits; and (4) payment of Social Security taxes.

While the work of delivery drivers for a restaurant is not considered a specialized trade, there is no evidence that it is usually done with supervision. The *Broussard* and *Cole* cases show that delivery truck drivers for other businesses work without supervision. The delivery of food was an integral part of Y&H's business. It was sufficiently

important that Hatipoglu and Khaleghi would drive when the demand was sufficient.

Hatipoglu and Khaleghi state it was never their intention for the drivers to be employees and the drivers did not intend to be employees. Rec. doc. 58 at Exhibits A and B. This statement is self-serving. Arbaugh submitted an affidavit from Sharon Davidson, a driver, who stated: (1) she considered it her job; (2) she worked 35-40 hours per week; and (3) if she did not perform properly her employment would be terminated. Rec. doc. 57 at Exhibit C. These statements coming after the fact also tend to be self-serving. In *Cole*, the parties signed a contract that was described as an independent contractor service agreement. Y&H did not have its drivers sign such a contract. The issue of the intention of the parties must be resolved by evidence that was in place before this issue arose. Y&H reported the payments to drivers on a Form 1099. Y&H did not withhold taxes for the drivers or pay Social Security taxes for them. This is evidence that Y&H did not intend the drivers to be employees like its kitchen and restaurant staff. The fact that the drivers retained 100% of all tips received by them, provided their own vehicles and paid all expenses, demonstrates they did not intend to be employees. An employee would have expected reimbursement of his mileage expenses if he used his vehicle during the course of the company's work.

The weight of the remaining eight factors cited by *Broussard* and *Cole* is against a finding that the drivers were employees of Y&H.[4]

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[4] In contrast to *Broussard* and *Cole*, the district court in *Steehler v. Product Development Corp.*, 2001 WL 196981 (N.D. Tex.), denied a motion to dismiss and found that the facts could permit a reasonable

(Continued on following page)

person to find an employer/employee relationship for purposes of Title VII, where the plaintiff was a delivery driver for telephone books. The district court stated:

> The fact that PDC will pay for damages to vehicles that occur while making PDC deliveries, reimburse carrier expenses on long-distance deliveries, require all PDC carriers to attend training sessions and watch videos before they begin delivery, and require mandatory drug testing in the event of an accident indicates that PDC maintains more control over its carriers than it could if those carriers were strictly independent contractors. Mr. Steehler does not select his own routes, nor does he decide the manner in which the telephone books are delivered. More importantly, the application Mr. Steehler signed to work for PDC binds him to solely deliver PDC's product. Based on the aforementioned information, this Court has determined that Mr. Steehler has satisfied his burden of production on a 12(b)(6) motion that he worked for PDC as an employee, rather than an independent contractor.

Id. at *3. The facts described in *Steehler* are not present with the drivers for Y&H.

In *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522 (5th Cir. 2001), the plaintiff asserted state law claims of breach of contract and unjust enrichment. At issue was whether the plaintiff was an independent contractor when he drove his truck for the defendant. The Fifth Circuit considered the economic realties test for Title VII and ADEA claims and the factors considered in a FLSA claim and held that the plaintiff was not an independent contractor. The Fifth Circuit stated:

> Acme treated Hathcock as an employee for tax purposes and withheld mandated federal and state income and social security taxes from his driver's paycheck, and paid Hathcock, the driver, a regular salary as an employee. *When he drove, the terms and conditions of Hathcock's employment were set by Acme:* He had to submit to Acme's medical and driving requirements; he was subject to discipline for violation of Acme's personnel policies, including anti-harassment, drug testing, and 401(k) Plan; he was subject to discharge by Acme for violations of its Driver Manual; he was bound to work exclusively for Acme; and while doing so he had to drive a truck sporting the Acme logo at all times.

Id. at 526. Again, this is dissimilar to the facts before the court here.

THE OWNER MANAGERS

For Y&H to have the requisite number, Hatipoglu and Khaleghi and their spouses must be employees. The issue is whether the corporate shareholders of a Subchapter S corporation, who also perform services for the corporation, should be considered employees of the corporation for purposes of Title VII. There is no Fifth Circuit decision that addresses this issue in the context of a Subchapter S corporation, a closely held corporation or a professional corporation. Arbaugh contends the issue should be determined by following *Trainor v. Appollo Metal Specialities, Inc.*, 318 F.3d 976, 983 (10th Cir. 2002), where the owner of a closely held corporation and a participant in a traditional employment relationship with the corporation was held to be an employee for purposes of Title VII. The defendants contend that the court should look to *Goudeau v. Dental Health Services, Inc.*, 901 F.Supp. 1139 (M.D. La. 1995) (Riedlinger, M.J.), where four dentists, who were owners of a professional corporation and who practiced dentistry through the professional corporation, were held not to be employees for purposes of Title VII.

In *Shores Realty Co., Inc. v. U.S.*, 468 F.2d 572, 573 (5th Cir. 1972), the Fifth Circuit stated:

> A corporate taxpayer found eligible for treatment as a "small business corporation" under Subchapter S of the Internal Revenue Code is relieved of the obligation of paying corporate income taxes. Instead, income received by the corporation is attributed directly to the corporation's stockholders, even if the corporation does not distribute its earnings to the stockholders in the form of money or property. Related provisions exist for the attribution of corporate losses to the stockholders.

Id. at 573, n. 3. In *Hollis v. Hill,* 232 F.3d 460 467 (5th Cir. 2000), the Fifth Circuit described the usual relationship between a closely held corporation and its shareholder as follows:

> Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and does not desire to assume the responsibilities of management, the shareholder in a close corporation considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership. Employment by the corporation is often the shareholder's principal or sole source of income. Providing employment may have been the principal reason why the shareholder participated in organizing the corporation. Even if shareholders in a close corporation anticipate an ultimate profit from the sale of shares, they usually expect (or perhaps should expect) to receive an immediate return in the form of salaries as officers or employees of the corporation, rather than in the form of dividends on their stock. Earnings of a close corporation are distributed in major part in salaries, bonuses and retirement benefits.

Id. at 467 (citations omitted).

In *Trainor* the only shareholders of the defendant corporation were Mr. and Mrs. Pilgrim. 318 F.3d at 978. Mr. Pilgrim was described as both an owner and a participant in a traditional employment relationship with the corporation. *Id.* at 983. The defendants argued that a partner in a partnership is not an employee for purposes of Title VII, and a shareholder owner in a closely held corporation should be treated like a partner for purposes of Title VII. The Tenth Circuit rejected this argument. It also

rejected the defendants' contention that it should follow those cases holding that shareholders in a professional corporation are not treated as employees under Title VII. *Id.* at 985-86. It recognized that, at least as to the issue of professional corporations, there was a split in the circuits. The Tenth Circuit stated:

> Courts addressing the term "employee" in the context of professional corporations have therefore either given conclusive weight to the choice of corporate form, or have disregarded that form because the entity functioned as a partnership.

Id. at 986. The Tenth Circuit concluded that decisions dealing with the circumstances in which a corporate officer or director is also a corporate employee offered the best guidance and stated:

> Courts have generally applied a three factor test in making this determination, looking to (1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in authority.

Id. at 986. The Tenth Circuit found that Mr. Pilgrim met the first and second factor but not the third, and even so found an employment relationship. In *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1539, 1539 (2nd Cir. 1996), the Second Circuit found that all three factors were present. While the Second Circuit did not state that all three factors had to be satisfied, it did state that the "authoritative evaluation by their superiors suggests that J & H directors *are* employees under the common law test." *Id.* at 1540 (emphasis in original).

Assuming that the Tenth Circuit was correct in applying the three factor test to determine whether a corporate officer or director is also a corporate employee, the undersigned questions whether two of the three factors are sufficient to establish the employee relationship. Whether the director or corporate officer reports to some person or group of higher authority sensibly is an essential element of the employer/employee relationship. That being so, then in many situations involving professional corporations and closely held corporations that element will be lacking.

Goudeau reached a result contrary to *Trainor.* In *Goudeau,* the court applied the test used by the Fifth Circuit to determine the existence of an employment relationship; an economic realities test:

> The Fifth Circuit applies the hybrid economic realities/common law control test to determine whether an individual is an employee or independent contractor. A review of decisions applying this test, as well as the cases which address the issue when a professional corporation or partnership is involved, shows that the court cannot look merely at the label placed on an individual's status but must look to the particular facts of each case and determine the economic realities of the relationship.

Id. at 1143. *Goudeau* applied the economic realities test to the dentist shareholders in a professional corporation, found that the management, control and ownership were much like that of a partnership, and, for purposes of Title VII, found the dentists were not employees.

In *Fountain v. Metcalf, Zima & Co., P.A.,* 925 F.2d 1398 (11th Cir. 1991), the plaintiff contended that he was

an employee of a professional corporation engaged in the practice of accounting and that he had a cause of action under ADEA. The sole issue was whether the plaintiff was a partner in the firm or an employee. *Id.* at 1399. The Eleventh Circuit applied the economic realities test and found that the plaintiff was a partner. *Id.* at 1401.

The Fifth Circuit uses the economic realities test to resolve whether a person is an employee for purposes of Title VII. It follows that the Fifth Circuit would look to the same test to determine whether a person is a partner or an employee of a closely held corporation, a Subchapter S corporation or a professional corporation for purposes of Title VII. The economic realities test demonstrates that Hatipoglu and Khaleghi were partners. They divided the profits equally and the responsibilities of running the business were similarly divided. By virtue of Y&H's status as a Subchapter S corporation, Y&H's losses flowed back to Hatipoglu and Khaleghi. Similarly, when business was slow, for example, in July of 2000, they did not take anything out of the business. In calendar year 2000, the couples each received $60,000 from Y&H. In calendar year 2001, they each received less than $30,000. Hatipoglu and Khaleghi reported to no one other than themselves and they had control over all aspects of the business. The court, after considering the relationship, concludes that Hatipoglu and Khaleghi were not employees of Y&H for purposes of Title VII.

THE SHAREHOLDER SPOUSES

Assuming *arguendo* that Hatipoglu and Khaleghi were employees for purposes of Title VII, their spouses must also be counted as employees to have the requisite

number of employees for subject matter jurisdiction. The spouses did no work at the restaurant. The only services they performed were occasional advertising and promotion. There is no evidence as to what the spouses actually did by way [sic] advertising and promotion. The only factor favoring a finding of an employment relationship is that Social Security taxes were paid on their income from the business.

Whether *Trainor* or *Goudeau* is followed, the result is the same. The first factor considered in *Trainor* is whether the person had undertaken traditional employee duties. The spouses did not. They did no work at the restaurant. The second factor is whether the person was regularly employed by a separate entity. At least one of the spouses was employed as a school teacher. The third factor is whether the persons reported to someone in higher authority. The arrangement for the spouses was established by Hatipoglu and Khaleghi, so it is assumed the third factor is present. The spouses did not meet the factors that *Trainor* viewed as dispositive. *Trainor,* 318 F.3d at 987. If the relationship of the spouses to Y&H is examined in light of the economic realities test, in accord with *Goudeau,* they were passive partners rather than employees. The spouses were not employees of Y&H for purposes of Title VII. Accordingly,

IT IS ORDERED that the judgment in favor of Arbaugh and against defendants (Rec. doc. 38) is VACATED and the defendants' motion to dismiss, pursuant to Fed. R. Civ. P. 12(h)(3) (Rec. doc. 44), which was converted to a motion for summary judgment, pursuant to Fed. R. Civ. P. 56 (Rec. doc. 59), is GRANTED.

IT IS FURTHER ORDERED that the following are DISMISSED as MOOT: (1) Arbaugh's motion attorney's fees (Rec. doc. 39); (2) Arbaugh's motion to amend judgment (Rec. doc. 40); and (3) defendants' renewed motion for judgment as a matter of law or in the alternative motion for a new trial and/or remittur (Rec. doc. 43).

New Orleans, Louisiana, this 2 day of April, 2003.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

MINUTE ENTRY
SHUSHAN, M.J.
DECEMBER 26, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JENIFER ARBAUGH	CIVIL ACTION
VERSUS	NO: 01-3376
Y&H CORPORATION, et al	SECTION: "R"(1)

HEARING ON MOTIONS

(Filed Dec. 27, 2002)

APPEARANCES: Submitted on briefs

MOTIONS:

DEFENDANTS' RULE 12(h)(3) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (Rec. doc. 44)

CONTINUED TO BE RESET AND SCHEDULING ORDER ISSUED

ARBAUGH'S MOTION FOR ATTORNEY'S FEES (Rec. doc. 39)

CONTINUED TO BE RESET

ARBAUGH'S MOTION TO AMEND JUDGMENT (Rec. doc. 40)

CONTINUED TO BE RESET

DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL AND/OR REMITTUR [sic] (Rec. doc. 43)

CONTINUED TO BE RESET

Before the undersigned is the motion of the defendants, Y&H Corporation ("Y&H") and Yalcin Hatipoglu, to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(h)(3). The defendants contend that Y&H does not qualify as an employer under 42 U.S.C. § 2000e(b). Y&H argues that it did not employ fifteen or more employees for twenty or more calendar weeks in either 2000 or 2001.

The plaintiff, Jennifer Arbaugh ("Arbaugh"), filed this action on November 18, 2001 and asserted claims under Title VII and Louisiana law. Arbaugh alleged that during her employment at the Moonlight Cafe, as a bartender and waitress, she was discriminated against because of her sex in that she was exposed to a hostile working environment and that in February, 2001 she was forced to resign. Rec. doc. 1. Arbaugh alleged that jurisdiction was present for these claims. *Id.* The defendants admitted Arbaugh's allegations as to jurisdiction but denied her allegations on the merits. Rec. doc. 4. The parties consented to the trial of the case before a Magistrate Judge. Rec. doc. 6. A pretrial order was entered and the parties stipulated to the presence of jurisdiction. Rec. doc. 19. The action was tried before a jury on October 28 and 29, 2002 and there was a verdict for Arbaugh. Rec. docs. 33 and 36. A judgment was entered in favor of Arbaugh and against the defendants. Rec. doc. 38. Arbaugh filed a motion for attorney's fees and a motion to amend judgment. Rec. doc. 38 and 40. The defendants also filed a motion for judgment as a matter of law or in the alternative for a new trial and/or remittur [sic]. Rec. doc. 43.

Arbaugh argues that: (1) the defendants admitted jurisdiction so subject matter jurisdiction is present; (2) the defendants' evidence concerning the number of persons employed by Y&H is contradicted by the evidence at the trial; and (3) the two owners of Y&H and their wives should be included in the employee count. In response to Arbaugh's dispute with the defendants' payroll information the defendants contend that the factual issues should be resolved in an evidentiary hearing.

It is unfair and a waste of judicial resources to permit the defendants to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict. The unfairness is compounded by the likelihood that Arbaugh's state law claims are prescribed. Unfortunately none of these considerations are sufficient to confer subject matter jurisdiction were [sic] it is lacking. Pursuant to Fed. R. Civ. P. 12(h)(3) "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." It is hard to imagine a more explicit statement. Arbaugh cites *Di Frischia v. New York Central Railroad Co.*, 279 F.2d 141 (3rd Cir. 1969), in support of her contention that the defendants' admission of the jurisdiction allegations shows subject matter jurisdiction is present. In *Di Frischia* the parties stipulated that diversity existed. After the plaintiff's claims were time barred, the defendant challenged diversity. The court of appeals held that the defendant could not amend its answer to put diversity at issue. *Id.* at 144 The Third Circuit recognized in *Rubin v. Buckman*, 727 F.2d 71 (3rd

Cir. 1984) that *Di Frischia* was "distinguishable" because the Supreme Court[1] held that subject matter jurisdiction can never be created by estoppel. In *Rubin* the plaintiff alleged the presence of diversity of jurisdiction. Only after he lost a motion for summary judgment did the plaintiff allege that he was not a citizen of Hong Kong but a citizen of New Jersey and contend there was no subject matter jurisdiction. In *Courty v. Prot* 85 F.3d 244, 249 (5th Cir. 1996), the Fifth Circuit rejected *Di Frischia* and described it as repudiated by the Supreme Court. Even if Arbaugh had alleged that there were more than fifteen persons employed by Y&H and the defendants admitted the allegation, the law does not preclude the defendants from raising the issue at this stage.

The burden rests with Arbaugh to show that subject matter jurisdiction is present. *Boudreau v. United States,* 53 F.3d 81, 82 (5th Cir. 1995). In light of the factual issues raised by the parties concerning subject matter jurisdiction Arbaugh shall have until February 7, 2003 to conduct any discovery on these issues. During this time the defendants shall respond to all discovery requests served by Arbaugh within five (5) working days. If requested by Arbaugh, Mr. and Mrs. Hatipoglu and Mr. and Mrs. Khaleghi shall make themselves available for depositions. By February 18, 2003 Arbaugh shall file a further memorandum in opposition to the defendants' motion to dismiss, including any evidence in support of subject matter jurisdiction. By February 25, 2003 the defendants shall file a further memorandum in support of their motion to dismiss, including any further evidence on the issues. By

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[1] *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 102 S.Ct. 2099, 2104 (1982).

March 4, 2003 Arbaugh may file a final memorandum in opposition to the defendants' motion to dismiss. The defendants' motion to dismiss shall be continued and reset for hearing on Wednesday, March 5, 2003, on briefs and without oral argument.

IT IS ORDERED that:

1. The defendants' Rule 12(h)(3) motion to dismiss for lack of subject matter jurisdiction (Rec. doc. 44) is CONTINUED and RESET for hearing on Wednesday, March 5, 2003, at 9:00 a.m. on briefs and without oral argument in accord with the terms of this minute entry.

2. Arbaugh's motion for attorney's fees (Rec. doc. 39), Arbaugh's motion to amend judgment (Rec. doc. 40) and defendants' renewed motion for judgment, as a matter of law or in the alternative motion for a new trial and/or remittur [sic] (Rec. doc. 43) are CONTINUED and RESET for hearing on Wednesday, March 5, 2003, at 9:00 a.m. on briefs and without oral argument.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30365

JENIFER ARBAUGH

Plaintiff-Appellant

v.

Y & H CORPORATION, doing business as
The Moonlight Cafe; YALCIN HATIPOGLU

Defendants-Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Filed Oct. 13, 2004)

(Opinion 8/2/04, 5 Cir., ___, ___ F.3d ___)

Before EMILIO M. GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
APR 11 2005
OFFICE OF THE CLERK

No. 04-944

In The

Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

vs.

Y & H CORPORATION, dba
THE MOONLIGHT CAFE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE

Respondent is Y & H Corporation dba The Moonlight Cafe. There is no parent corporation and none of its shares are held by a publicly traded company.

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REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ALREADY INDICATED THAT SECTION 701(b) OF THE 1964 CIVIL RIGHTS ACT (42 U.S.C. §2000e(b)) WHICH LIMITS THE DEFINITION OF "EMPLOYER" FOR TITLE VII PURPOSES TO THOSE WHO HAVE FIFTEEN OR MORE EMPLOYEES PRESENTS AN ISSUE OF SUBJECT MATTER JURISDICTION

Petitioner Jenifer Arbaugh presents this Court with the question of whether Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. §2000e(b), which defines "employer" as only those who have fifteen or more employees limits the subject matter jurisdiction of federal courts or only raises an issue going to the merits of a Title VII claim. Petitioner contends that this Court should grant writs in this matter primarily to resolve what she contends is a division in the circuit courts. While respondent will address below the degree to which such a division actually exists, respondent must begin with the fact that this Court has already indicated that this "numerosity" limitation is a jurisdictional requirement in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1998).

In *Walters*, the district court had dismissed a Title VII action for lack of subject matter jurisdiction upon the defendants' motion which contended that the defendant company did not employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year as required by §2000e(b). This Court granted a writ of certiorari directed to the Seventh Circuit Court of Appeals which had affirmed the district court's dismissal.

While the main issue which this Court addressed in *Walters* was whether an employer "has" an employee on days that the employee is employed but not working, this Court's treatment of the case reveals that it clearly viewed the employer definition contained in §2000e(b) as jurisdictional. In the unanimous opinion authored by Justice Scalia, this Court noted that defendants had filed and the district court had granted a motion to dismiss **for lack of subject matter jurisdiction**, which was upheld by the Court of Appeals. *Id.* at 204-205. Surely, if any of the justices on this Court had believed that the district and appellate courts had erred in addressing the employee numerosity requirement as a matter of subject matter jurisdiction, those justices would have so stated in either the Court's opinion or in concurring opinions.[1]

Even more revealing of this Court's acceptance of the jurisdictional nature of the numerosity requirement is the manner in which this Court remanded *Walters*. After concluding that the district court and the Seventh Circuit had used an improper method to calculate the number of weeks for which the defendant company satisfied the fifteen employee threshold, this Court examined the record and determined that the defendant company was an "employer" within the meaning of §2000e(b). *Id.* at 212. If,

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[1] The few appellate courts which accept petitioner's contention that a numerosity requirement is part of the merits of a plaintiff's employment claim had no difficulty independently correcting what they perceived to be a district court's incorrect invocation of subject matter jurisdiction. *See, e.g., Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962 (7th Cir. 1998) and *Nesbit v. Gears Unlimited*, 347 F.3d 72 (3rd Cir. 2003) (both affirming the district court's dismissal of plaintiff's Title VII claim while stating that the district court erred in basing the dismissal on a lack of subject matter jurisdiction).

as petitioner contends, §2000e(b)'s requirement of fifteen employees was part of a Title VII plaintiff's claim on the merits rather than an element of subject matter jurisdiction, this Court would not have determined that the defendant company in *Walters* was an "employer" given that the plaintiff in *Walters* had not filed a motion for summary judgment on that issue. Rather, this Court would have remanded the matter with instructions that the trier of fact determine the numerosity issue and thus the defendant company's employer status based upon the methodology delineated in this Court's opinion.[2] Given that this Court preempted such an examination and instead determined the employer status of the defendant company in *Walters*, one can conclude that this Court viewed the issue as one of subject matter jurisdiction and thus, appropriate for judicial, rather than jury, determination.[3]

II. SEVERAL OF THE CIRCUIT COURTS WHICH PETITIONER CITES AS ADOPTING THE VIEW THAT THE REQUIREMENTS OF §2000e(b) ARE NOT JURISDICTIONAL HAVE NOT UNIFORMLY HELD THIS POSITION

In discussing the asserted conflict in the circuits, petitioner maintains that the Second, Third, Seventh,

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[2] Respondent agrees with petitioner that a plaintiff who has demanded a jury trial has the right to the jury's determination on the disputed elements of her claim. (Petition for Writ of Certiorari ("Pet.") at 20-21.)

[3] While the Third Circuit in *Nesbit v. Gears Unlimited*, 347 F.3d 72 (3rd Cir. 2003) referenced *Walters* in a footnote in its discussion of the case law addressing the jurisdictional vs. merits nature of §2000e(b), it ignored the fact that this Court did not remand the matter for a jury determination in deciding to discount the significance of *Walters*.

Eleventh and District of Columbia Circuits "insist" that the employee-numerosity requirements in federal statutes are not jurisdictional. While it is true that each of these circuits have issued opinions with such holdings, a review of the case law from the Seventh, Eleventh and District of Columbia Circuits reveals that any such insistence from these circuits is not very insistent.

From the Seventh Circuit, petitioner cites *Papa v. Katy Industries*, 166 F.3d 937 (7th Cir. 1999), *Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962 (7th Cir. 1998), *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676 (7th Cir. 1998) and *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996) for the non-jurisdictional nature of the numerosity requirement. In her Petition, however, petitioner recognizes that just five years prior to the first of these decisions, the Seventh Circuit had held such numerosity requirements to be jurisdictional in *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577 (7th Cir. 1993).[4] Pet. at 12. Petitioner maintains that the Seventh Circuit expressly overruled *Rogers*, citing *Komorowski* and *Ost*. Neither the panel in *Komorowski* nor the panel in *Ost*, however, indicated that **they** were overruling *Rogers*. Rather, *Ost, id.* at fn. 1 (the earlier of these decisions) maintained that *Rogers* had been undermined by the court's decision in *EEOC v. The Chicago Club*, 86 F.3d 1423 (7th Cir. 1996). This seems unlikely, however,

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[4] "The mandate of the ADEA [Age Discrimination in Employment Act] only apply to businesses that employ twenty or more individuals. 29 U.S.C. §630(b). **For federal subject matter jurisdiction to exist**, the defendant must meet the definition of an employer as Congress set forth in §630(b)." *Rogers, id.* at 579 (emphasis added).

since *The Chicago Club* case did not even mention *Rogers* and did not involve a numerosity requirement.

From the Eleventh Circuit, petitioner cites *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) and the case upon which *Morrison* based its holding, *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997). Between its decision in *Garcia* and its decision in *Morrison*, however, in *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999), that court held that §2000e(b) established a jurisdictional requirement. Specifically, the Eleventh Circuit stated:

> Unless the appellees constitute an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year," Title VII is inapplicable and the district court lacks subject matter jurisdiction over Scarfo's claims.

Scarfo, id. at 961. *Scarfo* is completely consistent with the Eleventh Circuit's earlier decision of *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987) where the court held that a Title VII plaintiff must prove subject matter jurisdiction and an impediment to jurisdiction would be an inability to prove that their employer employed fifteen or more employees for the requisite time.

Finally, the District of Columbia's assertion in *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621 (D.C. Cir. 1997) that §2000e(b) does not establish a jurisdictional requirement is undermined by a concurrence in that very case. In his concurrence, Judge Sentelle observed:

> I concur in my colleagues' carefully reasoned opinion but write separately only to express my

> misgivings about a point of previously established circuit law; that is, that the question of the number of employees goes to sufficiency of a complaint under Rule 12(b)(6) as opposed to jurisdiction, disposable under Rule 12(b)(1). I agree with the majority that *Haddon v. Walters*, 310 U.S.App.D.C. 63, 43 F.3d 1488 (D.C. Cir. 1995), impels us to treat this as a Rule 12(b)(6) question rather than a jurisdictional one. Although I served on the panel in *Haddon*, I have become increasingly convinced that *Haddon* was incorrectly decided. Again, as the majority notes, three other circuits have treated the employee numbering requirement drawn from the Title VII provision of *42 U.S.C. §2000(e) et seq.* as jurisdictional. *McKenzie v. Davenport-Harris Funeral Homes*, 834 F.2d 930, 932-33 (11th Cir. 1987); *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979-80 (5th Cir. 1980). While it is true, as the majority notes, that none of the courts discussed why the question is jurisdictional, I nonetheless believe they have it right. While it is also true, as the majority notes, that "nothing in Title VII (or the ADA) expressly limits the district court's subject matter jurisdiction," Maj. Op. at 5, to me it is more important that nothing in Title VII or the ADA *extends* the district court's jurisdiction to cases not involving the requisite number of employees. The federal courts being courts of limited jurisdiction, I believe that our sister circuits are correct in holding that cases without a sufficient number of employees fall outside.

Id. at 626.

Based upon the foregoing opinions from the Seventh, Eleventh and District of Columbia Circuits, respondent

respectfully suggests that the actual split on the interpretation of §2000e(b) is not between the circuits but instead between certain panels in certain circuits. Such discrepancies undoubtably merit resolution by the involved circuits en banc. They do not, however, merit this Court's involvement.

III. THE DECISION OF THE FIFTH CIRCUIT IN NO WAY CONFLICTS WITH ANY DECISION OF THIS COURT

Petitioner contends that the decision of the Fifth Circuit in this case conflicts with three decisions of this Court, namely, *Bell v. Hood*, 327 U.S. 678 (1946), *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Petitioner is wrong with respect to each case.

Bell is clearly distinguishable from the issues presented herein. In *Bell*, the petitioners had instituted an action for monetary damages against agents of the Federal Bureau of Investigation contending that their rights under the Fourth and Fifth Amendments had been violated. Defendants sought and obtained dismissal for lack of subject matter jurisdiction contending that 1) petitioners were seeking damages for the state tort of trespass and not under the Constitution and 2) the district court lacked jurisdiction since the Constitution does not expressly provide for recovery of money damages for the violation of the Fourth and Fifth Amendments. On its review, this Court determined that petitioners' complaint clearly sought recovery under the Constitution, thus disposing of defendants' first argument. It was as to the second argument that this Court held that the possibility that plaintiff

might not have a cause of action upon which they might recover does not in itself defeat subject matter jurisdiction as the action still arose under the Constitution or laws of the United States.

Unlike *Bell*, where petitioners sought to protect Constitutional rights clearly subject to a federal court's review, petitioner herein seeks to protect rights of solely statutory creation. As such, Congress, in creating such rights, was free to limit the jurisdiction of the federal courts relative to such rights. As conceded by petitioner, at least six circuit courts (eight if the Seventh and Eleventh are included based upon the opinions referenced above), have determined that Congress decided to limit the jurisdiction of the federal courts in Title VII cases based upon the number of employees Pet. at 8. Given that all of these cases were decided after *Bell*, it is clear that the circuit courts did not view *Bell* as prohibiting such determinations.[5]

Petitioner also errs in contending that the Fifth Circuit's decision herein conflict with this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). *Steel Co.*'s discussion of jurisdiction addresses a statute of a type

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[5] Petitioner's *Bell* discussion also contains what respondent maintains is a misstatement of fact relative to the procedural history of this case. At page 15 of her petition, it is contended that the "*Bell v. Hood* standard is manifestly satisfied in a Title VII case **such as this in which a plaintiff alleges that the employer had the requisite fifteen employees**. . . ." (emphasis added). In fact, in her Complaint, petitioner never specifically alleged that respondent Y & H Corporation had fifteen or more employees and instead argued before the district court that respondent's Answer which admitted jurisdiction resolved the issued. App. at 46-48.

completely different from §2000e(b) numerosity requirement. The extent of the difference is demonstrated by the fact that petitioner does not compare 42 U.S.C. §11046(c), the object of *Steel Co.*'s attention, to §2000e(b) but rather to 42 U.S.C. §2000e-5(f)(3), the general jurisdictional statute found in Title VII.

Petitioner is further mistaken in attempting to apply *Steel Co.*'s admonition against reliance on drive-by jurisdictional rulings of this Court to the Fifth Circuit's decision in *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980). Clearly, this Court has the authority to determine what weight should be given to its cases and thus may admonish lower courts not to place undue weight on dicta contained therein. It would seem, however, that it is for the Fifth Circuit to decide how much weight it and its lower court should give to its decision in *Dumas*. Furthermore, petitioner's contention that the jurisdictional holding in *Dumas* was a casual remark ignores the fact that the Fifth Circuit was reviewing the district court's dismissal of the Title VII claims on subject matter jurisdiction grounds when other claims had been dismissed based on prescription or failure to state a claim upon which relief could be granted. *Dumas v. Town of Mount Vernon*, 436 F.Supp. 866 (S.D. Ala. 1977). Petitioner's speculation that the Fifth Circuit did not really mean that it was dismissing plaintiff's Title VII claims for lack of subject matter jurisdiction requires one to completely discount the district court's opinion.

The Fifth Circuit's decision herein is likewise not inconsistent with this Court's holding in *Zipes*. In determining in *Zipes* that Section 706(e) of Title VII which establishes the time limit for filing a charge with the EEOC was not jurisdictional, this Court examined both

the legislative history (which referred to Section 706(e) as a "time limitation") and the inferences to be drawn from prior cases where the Court had addressed Section 706(e). Petitioner makes no reference to legislative history with respect to §2000e(b) and the inferences to be drawn from the case where this Court previously addressed §2000e(b) run counter to petitioner's position. *See discussion of Walters, above.*

IV. THE DECISION OF THE FIFTH CIRCUIT POSES NO THREAT TO THE EFFICIENT AND PREDICTABLE CONDUCT OF CIVIL LITIGATION

At page 23 of her petition, petitioner makes the rather remarkable claim that "[b]y conflating the elements of a federal claim with the subject matter jurisdiction of the federal courts, the decision of the Fifth Circuit poses a serious threat to the efficient and predictable conduct of civil litigation." Given that the Fifth Circuit has held that the numerosity requirement is a jurisdictional one for 25 years, *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980), the Sixth Circuit has so held for 33 years, *Hassel v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972), and the Ninth Circuit for 22 years, *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983), one must wonder why petitioner sees such a grave threat in a decision consistent with 25 years of circuit precedent.

With respect to petitioner's discussion of the impact that the jurisdictional nature of §2000e(b) can have on the course of litigation, respondent will not dispute that consequences naturally flow from a determination that a certain statutory requirement is jurisdictional. Petitioner

seems to ignore, however, that a plaintiff would be obligated to investigate prior to filing suit the number of employees that his employer had regardless of whether the question was jurisdictional or related to the merits. In either case, a plaintiff would understand that he would be obligated to prove that the defendant employer had the requisite number of employees for the requisite number of weeks in the given years. Thus, many of the potential problems relative to the numerosity jurisdiction issue would be avoided by simple pre-litigation investigation.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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No. 04-944

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In The Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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I. THE QUESTION PRESENTED BY THIS CASE WAS NOT DECIDED, OR EVEN PRESENTED IN *WALTERS V. METROPOLITAN EDUCATIONAL ENTERPRISES, INC.*, 519 U.S. 202 (1997)

The Question Presented in the instant case was neither decided nor presented in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997). The question actually presented and decided in *Walters* was as follows:

> Whether an hourly paid employee who has an ongoing employment relationship with a person, as reflected by the employee's inclusion on the person's payroll, is counted as an employee of that person for purposes of Section 2000e(b) on days when the employee is not at work or on paid leave.[1]

Nothing in *Walters* purported even to consider whether the answer to this question went to the merits of the plaintiff's claims, or instead limited the jurisdiction of the court.

The lower courts in *Walters* had treated the employee numerosity requirement as jurisdictional.[2] In the procedural posture of *Walters* itself, however, whether or not the requirement is jurisdictional was irrelevant. Thus the decision in *Walters*, unsurprisingly and indeed quite properly, said nothing about whether the employee numerosity requirement in that case was jurisdictional.

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[1] *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, Nos. 95-770 and 95-259, Brief for the Equal Employment Opportunity Commission, p. i.

[2] The Seventh Circuit, in which *Walters* arose, has since disavowed that position. See *infra*.

Because this Court in *Walters* was conspicuously silent on this issue, Respondent infers that the Court, indeed *every* member of the Court, must have (tacitly) agreed that such a requirement is jurisdictional.

> Surely, if any of the justices on this Court had believed that the district and appellate courts had erred in addressing the employee numerosity requirement as a matter of subject jurisdiction, those justices would have so stated in either the Court's opinion or in concurring opinions.

(Br. Opp. 2).

This argument is profoundly inconsistent with the manner in which this Court reviews and decides cases. The very purpose of the certiorari procedure, and of the requirement that a petition state the question or questions presented, is to carefully delineate what issue the Court is undertaking to resolve. Once review has been granted, the Court will only decide issues fairly encompassed within that question presented. It emphatically is not the practice of this Court, or of its members, to include in opinions casual criticism of portions of decisions in the lower courts which were neither raised by the question presented nor briefed by the parties. The failure of the Court to include such remarks in any particular case reflects the considerable care with which the Court selects and decides issue, and is not the result of some *ad hoc* tacit approval process.

That is all the more so where, as here, the question never mentioned in an opinion of the Court concerns the jurisdiction of the federal courts. In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court emphasized the inappropriateness of "drive-by jurisdictional rulings." 523 U.S. at 91. If drive-by jurisdictional rulings are

inappropriate, surely *tacit* drive-by jurisdictional rulings are simply inconceivable.

Respondent suggests that the employee numerosity dispute in *Walters* would have been remanded for resolution by a jury if the Court had not tacitly concluded that the employee numerosity requirement is jurisdictional, and thus a matter for resolution by the court. (Br. Opp. at 2-3). But the parties in *Walters* had entered into extensive factual stipulations; the facts stipulated to by the employer were sufficient to meet the payroll approach adopted by the Court. Under those circumstances, there simply were no controverted factual issues to be remanded for resolution by any trier of fact.

II. THE COURTS OF APPEALS ARE SHARPLY DIVIDED REGARDING THE QUESTION PRESENTED

We noted in the petition that the opinion of the court below conflicts with decisions in the Second, Third, Fifth, Eleventh, and District of Columbia Circuits. (Pet. 9-14). Respondent does not deny that Second and Third Circuits have clearly rejected the holding of the court below that employee numerosity requirements are jurisdictional.

The District of Columbia Circuit held that such requirements are not jurisdictional in *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621 (D.C.Cir. 1997). Respondent asserts that the holding of *St. Francis Xavier* "is undermined by [Judge Sentelle's] concurrence in that very case." (Br. Opp. 5). But Judge Sentelle's concurring opinion was merely that, a concurrence. The two other members of the panel joined in the majority opinion holding, contrary to the decision in the instant case (and

contrary to the minority view expressed by Judge Sentelle), that employee numerosity requirements are not jurisdictional. That majority opinion constitutes the law of the circuit in the District of Columbia Circuit. Judge Sentelle did not suggest otherwise; to the contrary, Judge Sentelle expressly acknowledged that the holding of the majority had since 1995 been the controlling law of the circuit in the District of Columbia Circuit.[3]

The Seventh Circuit has reiterated in five decisions since 1995 that employee numerosity requirements are not jurisdictional. *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001-02 (7th Cir. 2003); *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998); *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n. 1 (7th Cir. 1996). Respondent suggests that the Seventh Circuit merely presents an unresolved intra-circuit disagreement, and that the Seventh circuit has never disavowed an earlier decision in *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577 (7th Cir. 1994). "Neither the panel in *Komorowski* nor the panel in *Ost*, however, indicated they were overruling *Rogers*." (Br. Opp. 4). To the contrary, the 1998 panel in *Komorowski*

[3] "I agree with the majority that *Haddon v. Walters*, 319 U.S.App.D.C. 63, 43 F.3d 1488 (D.C.Cir. 1995), impels us to treat this as a Rule 12(b)(6) question rather than a jurisdictional one." 117 F.3d at 626.

explained at length why and how the Seventh Circuit had disavowed the earlier 1994 decision in *Rogers*.[4]

The Eleventh Circuit has twice held that employee numerosity requirements are not jurisdictional. *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003); *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997). Respondent suggests that the Eleventh Circuit presents no more than an intra-circuit conflict, noting that between *Morrison* and *Garcia* there was an intervening decision with dicta to the contrary in *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999). (Br. Opp. 5). The Eleventh Circuit has authoritatively resolved this problem. The Eleventh Circuit's most recent decision in *Morrison* emphatically disavowed *Scarfo*, explaining that *Scarfo* had erred in failing to follow the earlier binding precedent in *Garcia*.

> Having reviewed *Garcia* and *Scarfo*, we are compelled to the same conclusion as Judge Barkett: *Garcia* was "squarely applicable" to the facts of *Scarfo*. [175 F.3d at 961] (Barkett, J., dissenting.)

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[4] 162 F.3d at 964:

> We recently *clarified* that a district court does not lack subject matter jurisdiction in cases where the defendant fails to meet the statutory definition of "employer." . . . *Ost v. West Suburban Travelers Limousine, Inc.*. . . . In *Ost* this court noted that *prior* circuit case law had characterized the issue of a defendant's status as an "employer" as a matter of subject matter jurisdiction. . . . *See, e.g., Rogers v. Sugar Tree Prods., Inc.*. . . . The *Ost* court *nonetheless* concluded that *E.E.O.C. v. Chicago Club*, 86 F.3d 1423 (7th Cir. 1996), "*makes clear* that a plaintiff's failure to establish that a defendant is an 'employer' does not divest the federal courts of the power to hear the plaintiff's case." 88 F.3d at 438 n. 1.

(Emphasis added).

> By concluding otherwise, *Scarfo* effectively overruled *Garcia sub silentio*. . . .
>
> A prior panel decision of this Court is binding on subsequent panels and can be overturned only by the Court sitting en banc. . . . *Garcia* preceded *Scarfo* and, in our view, correctly states the law in our circuit. As a panel of this Court ourselves, it is not for us to decide whether *Garcia should* be the law in this Circuit. . . . Rather, we conclude *Garcia is* the law in this Circuit and must be respected.

323 F.3d at 929. In the Eleventh Circuit today there is absolutely no question that *Morrison* and *Garcia*, not *Scarfo*, are the law of the circuit.

Respondent errs in suggesting that disputes about employee numerosity requirements can be "avoided by simple pre-litigation investigation." (Br. Opp. 11). To the contrary, litigation about employee numerosity usually involves complex factual and legal issues. In the instant case, for example, substantial discovery was needed to create a record involving considerable documentary and sworn evidence; the decisions below turned on confidential issues – such as whether the wives who worked at the restaurant were supervised by their husbands, or had taxes deducted from their paychecks (Pet. App. 18-20) – that could hardly have been brought to light by "simple pre-trial investigation." The record in *Walters* included some 52 charts summarizing the employer's records.[5]

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[5] *EEOC v. Metropolitan Educational Enterprises, Inc.*, Nos. 95-779 and 95-250, Brief for the Equal Employment Opportunity Commission, p. 5.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit

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No. 04-944

In The Supreme Court of the United States

JENIFER ARBAUGH,

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v.

Y & H CORPORATION,

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Section 701(b) of Title VII of the 1964 Civil Rights Act limits the Title VII prohibition against employment discrimination to employers with fifteen or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim?

PARTIES

The petitioner is Jenifer Arbaugh. The respondent is Y & H Corporation, doing business as The Moonlight Cafe.

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OPINIONS BELOW

The August 2, 2004, decision of the Court of Appeals, which is reported at 380 F.3d 219 (5th Cir. 2004), is reprinted in the Appendix to the petition. (App. 1-22). The October 13, 2004, decision of the Court of Appeals, denying the petition for rehearing en banc, which is not officially reported, is reprinted in the Appendix to the petition. (App. 50-51). The April 3, 2003 decision of the District Court, 2003 WL 1797893 (E.D.La.), which is not officially reported, is reprinted in the Appendix to the petition. (App. 24-44). The December 27, 2002 order of the District Court, which is not officially reported, is reprinted in the Appendix to the petition. (App. 45-49).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 2, 2004. A timely petition for rehearing en banc was denied on October 13, 2004. Certiorari was granted on May 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(b), provides in pertinent part:

> The term "employer" means an employer engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .

Section 706(f)(3) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3), provides in pertinent part:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

Section 1331 of 28 U.S.C. provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

In November 2001 petitioner Jenifer Arbaugh commenced this action in federal district court against her former employer, Y & H Corporation.[1] The plaintiff alleged that she had been sexually harassed, that a co-owner of the firm had assaulted her while at work, and these actions resulted in her constructive discharge.[2] Plaintiff sought relief under Title VII of the Civil Rights Act of 1964 and under Louisiana anti-discrimination[3] and tort law.[4]

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[1] Petitioner also sued one of the owners of the corporation for battery. The jury returned a verdict in favor of that defendant on that claim.

[2] At trial petitioner offered evidence that she had been subject to a series of sexually abusive remarks, which culminated in an incident in which one of the employer's owners reached under petitioner's dress and grabbed her genital area. Petitioner resigned after that last incident.

[3] La. Rev. Stat. §§ 23:301 *et seq.*

[4] La. Civil Code art. § 3215.

For more than a year of litigation the defendant[5] did not dispute either the applicability of Title VII or the subject matter jurisdiction of the court. Part I of the complaint asserted that federal jurisdiction existed under 28 U.S.C. §§ 1331 and 1367.[6] Defendant's answer stated that those jurisdictional allegations "are admitted."[7] Following the completion of pleading, the court entered a minute order noting that "[j]urisdiction and venue are established."[8] The court provided the parties with a detailed Pre-Trial Notice, which included an admonition to counsel to raise any possible problems regarding jurisdiction.[9] In August 2002 counsel for the parties signed a proposed Pre-Trial Order, later signed by the court, which stated that the court had jurisdiction over the federal and state claims under sections 1331 and 1367 respectively.[10]

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[5] Because the individual defendant is no longer a party to this litigation, we refer to the defendant in the singular.

[6] Complaint, p. 1 ("This Court is vested with jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and is vested with supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.")

[7] Answer to Complaint, p. 1.

[8] Minute entry, January 28, 2002.

[9] Pre-Trial Notice, p. 2 ("At the [required pre-trial meeting of counsel], counsel **must** consider the following:

> A. **Jurisdiction**. Since jurisdiction may not ever be conferred by consent and since prescription or statutes of limitations may bar a new action if the case or any ancillary demand is dismissed for lack of jurisdiction, counsel should make reasonable effort to ascertain that the Court has jurisdiction.") (Emphasis in original).

[10] Pre-Trial Order, P. 2 ("The Court is vested with jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331. The Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.")

After a jury trial conducted before a Magistrate Judge,[11] the jury found that plaintiff had been sexually harassed and constructively discharged in violation of federal and state anti-discrimination law. The jury awarded her $5,000 in back pay, $5,000 in compensatory damages, and $30,000 in punitive damages. The trial court entered judgment for plaintiff on November 5, 2002.

Seventeen days following trial, on November 19, 2002, the defendant filed a post-trial Motion to Dismiss for Lack of Subject Matter Jurisdiction. Section 701(b) of Title VII defines an "employer" subject to Title VII title as an employer with fifteen or more employees during certain periods of time. The defendant contended that during the relevant time period it had fewer than fifteen employees. The defendant included with the post-verdict motion a detailed analysis of its payroll records, two affidavits, and 76 pages of payroll records.

Because the defendant had not raised this contention prior to or at trial, it would ordinarily have been waived. However, the defendant contended that the lack of the requisite fifteen or more employees did not go to the merits of the claim, but instead deprived the district court of subject matter jurisdiction over the Title VII claim. In its supporting Memorandum the defendant emphasized that "as this Court is well aware, subject matter jurisdiction can neither be waived nor created by consent and may be raised at any time."[12]

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[11] The proceedings in the district court had, with the consent of the parties, been referred to the Magistrate Judge.

[12] Memorandum in Support of Rule 12(h)(3) Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 1.

The Magistrate Judge held that the fifteen-employee requirement in section 701(b) is indeed jurisdictional, and that the defendant could therefore raise this objection at any time in the proceedings, including after entry of judgment. (App. 45-49). The Magistrate Judge commented:

> It is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict. The unfairness is compounded by the likelihood that Arbaugh's state law claims are prescribed. Unfortunately none of these considerations are sufficient to confer subject matter jurisdiction where it is lacking.

(App. 47).[13]

The court did not initially rule on the merits of the motion. Rather, "[i]n light of the factual issues raised by the parties," the court deferred any ruling pending discovery, and ordered that the parties then file additional memoranda. (App. 48). After reviewing the results of that discovery and briefing, the court ordered yet further discovery on certain specific issues, and directed the parties to file still more briefs. (App. 25). The discovery ultimately included two depositions, ten affidavits and a substantial number of documents, including payroll and tax records.

Finally, on April 4, 2003, five months after the original jury verdict and entry of final judgment, the Magistrate

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[13] Under Louisiana law a cause of action outside the applicable period of limitations is characterized as prescribed.

Judge concluded that the defendant had fewer than fifteen employees. There were usually more than fifteen workers being paid by the defendant during the relevant time period.[14] But the district court concluded, after a detailed analysis of the disputed and undisputed facts, that a number of those workers were not "employees" within the meaning of Title VII. The court held that the drivers who delivered food for the restaurant, although working full time, were independent contractors rather than employees. (App. 32-37). It further reasoned that two part-time female employees who did advertising and promotional work, and who were married to the co-owners, were passive partners rather than employees. (App. 42-43). The district court vacated the jury verdict in favor of plaintiff, dismissed the federal claim for lack of subject matter jurisdiction, and dismissed the state law claims without prejudice. (App. 23).

On appeal the threshold question raised by the parties was whether the fifteen-employee requirement in section 701(b) limits the subject matter jurisdiction of the federal courts. In its opinion of August 2, 2004, the Fifth Circuit panel held that that employee-numerosity requirement is jurisdictional. (App. 5-9). The court of appeals affirmed as not clearly erroneous the district court's finding that the defendant in fact had fewer than fifteen employees. (App. 10-21).

Plaintiff filed a timely petition for rehearing en banc, asking the Fifth Circuit to reconsider the panel's holding

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[14] Title VII requires that an employer have at least 15 workers during at least twenty weeks of the year. There were 12 admitted employees for more than the required twenty weeks. There were in addition approximately 8 full time drivers whose status was in dispute.

that the requirement of section 701(b) is jurisdictional. On October 13, 2004, the Fifth Circuit denied the petition for rehearing en banc. (App. 50). On May 16, 2005 this Court granted certiorari.

SUMMARY OF ARGUMENT

(1) Section 701(b) of Title VII defines the employers subject to the requirements of Title VII as those employers which have 15 or more employees during certain specified periods. Whether a defendant is an employer within the scope of Title VII is an element of the merits of a Title VII claim. Such merits issues, unlike jurisdictional issues, can be waived. In the instant case the defendant waived the employee-numerosity issue by failing to raise it until after trial.

The language of section 701(b) does not refer in any way to federal jurisdiction over Title VII claims, or contain any reference to the separate statutory provisions which create that jurisdiction. Rather, section 701(b) is merely one of thirteen definitions in section 701 of the terms used in the text of Title VII. The court below did not suggest that any of the other definitions in section 701 are jurisdictional.

Jurisdiction over Title VII is established, not by section 701(b), but by section 706(f)(3) and by 28 U.S.C. § 1331. Neither of those jurisdictional provisions contains any requirement that the defendant meet the section 701(b) definition of an employer; neither provision limits jurisdiction to actions against employers or any other type of defendant. Sections 706(f)(3) and 1331 demand only that the complaint assert that the plaintiff was injured by

a violation of Title VII. Section 701(b) does not modify section 706(f)(3) or repeal by implication section 1331.

When Congress has wanted to limit the scope of a statutory grant of jurisdiction, it has done so expressly, either by including that limitation in the jurisdictional provision itself, or by adopting a separate provision that refers expressly either to the jurisdictional provision or to jurisdiction. A statute should not be construed to affect the jurisdiction of the courts where, as here, that statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982).

(2) A jurisdictional requirement that turns on complex factual issues would impose serious burdens on the courts and federal claimants.

Administration of the employee-numerosity requirement requires precisely the sort of fact-bound inquiries that are inappropriate for a jurisdictional rule. Disputes about employee-numerosity require detailed factual information regarding one or more of several issues:

(a) The employer's payroll records for a two year period, including resolution of any disputes regarding the accuracy of those records.

(b) A determination of whether some workers were independent contractors rather than employees, a problem which the court below correctly observed requires "a fact-intensive inquiry." (App. 17).

(c) A resolution of whether some workers should be deemed owners rather than employees, applying the six part standard of *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

(d) A decision as to whether two or more related employers should be treated as a single entity.

Although the courts are obligated to raise jurisdictional issues sua sponte, they would be unable to do so regarding such a fact-bound jurisdictional rule unless one of the parties had already offered substantial relevant evidence. In the instant case the district court understandably had no idea there was a possible problem regarding the employee-numerosity requirement until the defendant raised that issue after trial. If the employee-numerosity requirement were jurisdictional, courts would also be obligated to reach that jurisdictional issue first, and to resolve all of the related factual questions, even though a simpler non-jurisdictional basis was available for resolution of the case.

If the employee-numerosity requirement were jurisdictional, a defendant could fail to raise this issue until after trial, as occurred in this case. The district court correctly observed that "[i]t is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." (App. 47). In the instant case the defendant's delay in raising employee-numerosity may have been merely an oversight of counsel. But if the jury had returned a verdict for the defendant on all claims, counsel for defendant assuredly would not have come forward after trial to object to a lack of jurisdiction and suggest that petitioner's state claims be dismissed without prejudice.

ARGUMENT

I. INTRODUCTION

This is a case about the fundamental distinction between the merits of a claim and the subject matter jurisdiction of a federal court to decide that claim. In order to obtain relief, a plaintiff must prevail both with regard to the merits and concerning the existence of jurisdiction. But there are important practical and procedural differences between disputes related to the merits and questions regarding subject matter jurisdiction. "There is a gulf between defeat on the merits and a lack of jurisdiction." *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998).

Subject matter jurisdiction delineates the class of cases that the court "is competent to adjudicate." *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 615, 630 (2002). A litigant which has a colorable basis for challenging subject matter jurisdiction can withhold that objection, try the case on the merits, and raise that jurisdictional objection only if and after it has lost on the merits. Even if no party questions the existence of jurisdiction, the court itself – including this Court – is required to raise on its own a possible lack of subject matter jurisdiction. *Johnson v. California*, 541 U.S. 428 (2004); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). Unlike a rejection on the merits of a federal claim, a holding that there is no jurisdiction over a federal claim requires dismissal without prejudice of any supplemental state-law claims, even if

those state claims have been fully tried and determined on the merits.

The existence of subject matter jurisdiction confers on the court authority to decide the case, not merely authority to decide the case favorably to the plaintiff. Neither the failure of a plaintiff to establish some element of his or her claim, nor the success of an affirmative defense, call into question the court's jurisdiction.

> [I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. Hood, 327 U.S. 678, 682 (1946).

A court has subject matter jurisdiction over a federal claim, despite the ultimate failure on the merits of the asserted claim, except in the extreme case in which that claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83. The complaint in this case asserted a cause of action under Title VII of the 1964 Civil Rights Act; such an action falls easily within the district court's federal question jurisdiction. Respondent has never contended that the Title VII

claim in the instant case is so patently groundless as to provide no basis for federal jurisdiction.

The question here is whether Title VII itself contains a distinct type of jurisdictional limitation, stripping the federal courts of jurisdiction to hear certain complaints asserting Title VII claims. In a few instances Congress has chosen with regard to a particular type of federal claim to impose such a specific limitation on the subject-matter jurisdiction of the federal courts. (Prior to 1976, for example, federal question jurisdiction under section 1331 was limited to cases in which the amount in controversy exceeded $10,000). Section 701(b) of Title VII defines "employer" to mean an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year." The court below held that section 701(b) limits subject matter jurisdiction over Title VII actions to claims against those employers which in fact have the required fifteen employees.[15]

As we explain below, however, nothing in the language or purpose of Title VII remotely suggests that Congress intended the definition in section 701(b) to affect the subject matter jurisdiction of the federal courts. To the contrary, the employee-numerosity requirement of Title VII manifestly is merely one of several elements of the merits of a Title VII claim, not a restriction on the subject matter jurisdiction of the courts.

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[15] Similar questions have arisen regarding the employee-numerosity requirements of the Americans With Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. See Petition, p. 7 and nn.9, 10, and 11.

II. THE TEXT OF TITLE VII MAKES CLEAR THAT THE EMPLOYEE-NUMEROSITY REQUIREMENT IS NOT JURISDICTIONAL

The determination of whether the section 701(b) employee numerosity requirement is jurisdictional[16] necessarily begins with the language of Title VII itself. The inquiry ends there as well, because the statutory text is entirely clear. Section 701(b) has nothing to do with subject matter jurisdiction; it is simply one of thirteen definitions of the terms used in Title VII.

A. Section 706(f)(3) Of Title VII, Which Confers Jurisdiction Over Claims Arising Under That Title, Contains No Limitation Based On The Number Of A Defendant's Employees

Title VII contains express language governing the subject-matter jurisdiction of the federal courts. That jurisdictional provision, however, is not in section 701(b), but in section 706(f)(3).[17] "Each United States district court and each United States court of a place subject to the

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[16] In this brief we use the terms jurisdiction and jurisdictional to refer to whether a particular claim is within the subject matter jurisdiction of the courts. In other contexts "jurisdiction" is used to refer (a) to in personam jurisdiction over a particular defendant, or (b) to legislative jurisdiction, whether a specific subject matter is within the authority of Congress to restrict or regulate. Jurisdiction, this Court has observed, "is a word of many, too many meanings." *Steel Company v. Citizens for A Better Environment*, 523 U.S. 83, 90 (1998) (*quoting United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C.Cir. 1996)).

[17] There is also a jurisdictional provision in section 709(d). *See* p. 21, *infra*.

jurisdiction of the United States shall have jurisdiction of actions brought under this title." 42 U.S.C. § 2000e-5(f)(3). The broad language of section 706(f) ("brought under") is similar to the inclusive language of section 1331 ("arising under.")[18] An action is "brought under" Title VII, and thus within the court's jurisdiction under section 706(f)(3), if the complaint *asserts* that Title VII forbade the action of the defendant and provides a cause of action for that violation. Whether or not the plaintiff ultimately succeeds in establishing those assertions is irrelevant to the court's jurisdiction. "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought." *The Fair v. Kohler Die & Specialty*, 228 U.S. 22, 25 (1913).

This Court construed a similarly phrased statute in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). A provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(c), conferred on district courts "jurisdiction in actions *brought under* subsection (a) of this section." (Emphasis added).

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[18] Section 706(f)(3) appears to have been included in Title VII because in 1964 claims under section 1331 were subject to a jurisdictional amount requirement that Congress did not want to apply to Title VII claims. Although there was then (as now) no jurisdictional amount requirement for civil rights claims under section 1343(4), Congress had emphatically based Title VII on its power under the Commerce Clause, and could have doubted whether claims under Commerce Clause legislation would be deemed civil rights legislation under section 1343(4).

In addition to "each United States district court" section 706(f)(3) also confers jurisdiction on "each United States court of a place subject to the jurisdiction of the United States." This was necessary because district courts for Guam and the Virgin Islands are not denoted United States district courts. *Guam v. Olsen*, 431 U.S. 195, 196 n.1 (1977).

The Court rejected the suggestion that there would be no jurisdiction under section 11046(c) if the conduct complained of did not actually violate section 11046(a). "It is unreasonable to read [subsection (c)] as making all the elements of the cause of action under subsection (a) jurisdictional." 523 U.S. at 90. "In referring to actions 'brought under' § 11046(a), § 11046(c) means suits *contending* that § 11046(a) contains a certain requirement." 523 U.S. at 93 (Emphasis in original).

In the instant case respondent objects that it had too few employees to be subject to the Title VII prohibition against sexual harassment. But even if the court or a jury, as appropriate, were to determine (for that or any other reason) that respondent had not violated Title VII, the underlying action – asserting that Title VII *had* been violated – would still be one "brought under" Title VII. In those instances in which this Court has determined that the alleged actions of the employer were not forbidden by Title VII at all, it has treated that decision as going to the merits of the case, rather than as a finding that the federal courts had never had jurisdiction over the cause of action in the first place. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Whether the actions of a defendant actually violated federal law – unlike whether the complaint in an action can fairly be said to encompass an allegation that federal law was violated – goes to the very essence of the merits of a case.

B. The Definition Of "Employer" In Section 701(b) Does Not Limit Federal Subject Matter Jurisdiction

The court below understandably did not hold that the instant action was not "brought under" Title VII as required

by section 706(f)(3). It relied instead on section 701(b), which defines the "employer[s]" subject to the commands of Title VII. But nothing in section 701(b) purports to limit or affect the subject-matter jurisdiction conferred by section 706(f)(3). Far from in any way relating to jurisdiction, section 701(b) is merely one of thirteen definitions in section 701.[19] The court of appeals did not suggest that any of the other twelve definitions – such as the definitions of "employee" or "labor organization" – would also be jurisdictional in nature.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), rejected a similar effort to import into the broad jurisdictional provision of section 706(f)(3) a limitation found instead in another provision of Title VII. In *Zipes*, the employer contended that section 706(e) of Title VII, which requires complaining parties to file a timely charge with EEOC, restricted the subject matter jurisdiction of the district courts. In rejecting that contention, this Court emphasized that the actual jurisdictional provision of Title VII, section 706(f)(3), is distinct from the other procedural and substantive provisions of the statute.

> The provision granting district courts jurisdiction under Title VII, [section 706(f)(3)], does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely

[19] Section 701 also provides definitions of "person," "employment agency," "labor organization," employee, commerce, industry affecting commerce, state, religion, because of sex, complaining party, demonstrates, and respondent.

> separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

455 U.S. at 393-94 (footnote omitted). Precisely the same is true of the relationship between section 706(f)(3) and 701(b). Section 706(f)(3) confers jurisdiction over all actions brought under Title VII; it contains no reference to the Title VII definition of an employer, and is not limited to cases in which the plaintiff successfully meets that or any other statutory requirement. Conversely, the definition of employer is in an entirely separate section, which "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394.

The decision of Congress to limit coverage of Title VII to entities with fifteen or more employees does not by any stretch of the imagination imply that Congress intended that the issue of *whether* an entity had fifteen or more employees should be treated as a matter of subject matter jurisdiction. Title VII contains eight other limitations on which entities are subject to Title VII in the treatment of their employees.[20] For example, a bona fide private membership club is not an employer within the section 701(b) definition; similarly, Title VII is expressly inapplicable to

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[20] Section 701(b), 42 U.S.C. § 2000e(b), excludes from the definition of employer firms with fewer than 15 employees, federal agencies, corporations wholly owned by the United States, Indian tribes, certain agencies of the District of Columbia, and bona fide membership clubs. Section 702(a), 42 U.S.C. § 2000e-1(a), excludes employers insofar as they employ aliens outside the United States, and certain religious entities insofar as they have a preference for members of a particular religion. Section 702(c)(1), 42 U.S.C. § 2000e-1(c)(1), excludes from coverage by Title VII the foreign operations of a non-American employer not controlled by an American employer.

the employment of aliens outside the United States. The court below did not suggest that any of these restrictions on which employers are subject to Title VII affected subject matter jurisdiction. The employee-numerosity rule should not be treated differently from the other limitations on the coverage of employers.

Neither does the language of Title VII provide any Principled basis for treating the employee-numerosity requirement differently from any of the other restrictions on the scope and commands of the statute. Title VII, for example, only applies to "employees," a term limited both by its ordinary meaning and by the definition in section 701(f). The courts below assumed that definition of employer and employee are inextricably connected, reasoning that the determination of whether a defendant had fifteen employees should turn on whether particular workers are covered employees (rather than independent contractors or owners) within the meaning of the statute.[21] In the instant case, for example, the district court's finding that the defendant did not have the requisite fifteen employees

[21] There is some disagreement among the lower courts as to whether the only workers to be considered in determining employee-numerosity are individuals who are employees protected *by* Title VII. 2 B. Lindemann and P. Grossman, *Employment Discrimination Law*, p. 1307 nn.162-63 (1996). Because the purpose of the employee-numerosity requirement is to protect small firms from the cost of litigation, it might well make sense to include for purposes of section 701(b) independent contractors, partners, and other owner-workers who might not be protected employees, since the existence of those non-protected workers would clearly bear on the economic resources of the defendant. In the instant case, for example, the workers disregarded by the lower courts because they were not protected employees actually constituted about half of the defendant's entire workforce.

The Question Presented in this case does not, however, encompass this issue.

rested entirely on its holding that many of the workers paid by respondent were technically not employees within the meaning of Title VII. (App. 32-43). If the definition of employer is jurisdictional, it is difficult to see why that would not also be true of the definition of employee.[22]

Treating a statutory requirement as a limitation on the jurisdiction of the federal courts imposes on courts and litigants alike a number of significant and potentially harsh burdens; in the absence of clear language to the contrary, Congress can ordinarily be assumed not to have wished to create those problems.[23] In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998), this Court warned the courts to avoid "drive-by jurisdictional rulings." Similar caution should be exercised before construing the requirements of federal statutes as imposing limitations on the subject matter jurisdiction of the court.

When Congress has wanted to establish a specific limitation on the subject matter jurisdiction of the federal courts, it has deliberately used the term "jurisdiction" to make clear that such a limitation was being imposed. Congress has usually done so by including such limitations in the very provision which affirmatively grants the federal courts jurisdiction over the type of claim involved.[24]

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[22] In *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987), the court of appeals held that whether a plaintiff was an employee within the meaning of Title VII was a jurisdictional issue.

[23] "[J]urisdiction-stripping rules must be expressed clearly." *United Phosphorous, Ltd v. Angus Chemical Co.*, 322 F.3d 942, 954 (7th Cir. 2003) (en banc) (Wood, J., dissenting).

[24] *See, e.g.*, 2 U.S.C. § 1408(a) ("The district courts . . . shall have jurisdiction over any civil action commenced under section 1404 of this title and this section by a covered employee who has completed counseling under section 1402 of this title and mediation under section

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In this manner Congress in a number of statutes has expressly limited federal jurisdiction to actions brought by certain plaintiffs,[25] or by plaintiffs who have exhausted administrative remedies[26] or engaged in mediation,[27] to actions in which the amount in controversy exceeds[28] or is smaller than[29] a given value, or to actions which have been filed within a specified period.[30] These statutes emphatically

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1403 of this title."); 5 U.S.C. § 8961 ("The district courts ... have original jurisdiction ... of a civil action or claim against the United States under this chapter after such administrative remedies as required under section 8953(d) have been exhausted."); 15 U.S.C. § 814 ("*provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3000.") (Emphasis in original).

In a few instances Congress has limited the grant of jurisdiction by enacting a separate provision which expressly refers to or restricts application of the jurisdictional provision. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 756-61 (1975).

[25] *E.g.*, 15 U.S.C. § 1339 (action brought by the Attorney General), 470ff(c) (action by the United States), 49 U.S.C. § 24301(m)(2) (actions by Amtrak).

[26] 5 U.S.C. §§ 8961, 8991, 9007.

[27] 2 U.S.C. § 1408(a).

[28] *E.g.*, 15 U.S.C. § 814 (jurisdiction over certain condemnation proceedings limited to cases in which the amount claimed exceeds $3000); 28 U.S.C. § 1332 (diversity jurisdiction limited to cases in which the amount in controversy exceeds $75,000).

[29] 22 U.S.C. § 6713(1), 28 U.S.C. § 1346(a)(2).

[30] *E.g.*, 7 U.S.C. §§ 808c(15)(B), 2111(b), 2713(b), 3409, 4313(b), 4509(b), 4609(b), 4814(b)(1), 4909(b), 6008(b)(1), 6106(b)(1), 6202(b)(1), 6306(b)(1), 6410(b)(1), 7106(b)(1), 7418(b)(1), 7447(b)(1), 7467(b)(1), 7486(b)(1).

For examples of other limitations on statutory grants of jurisdiction, *see* 21 U.S.C. § 332(a) (no jurisdiction over certain claims), 28 U.S.C. § 1330(a) (no jurisdiction if sovereign immunity exists), 28 U.S.C. §§ 1333 (jurisdiction if prize ship is in the United States), 1338(b) (jurisdiction over unfair competition claim only if related to a patent claim), 1340 (no jurisdiction if claim is within the jurisdiction of

(Continued on following page)

demonstrate – if indeed such demonstration were needed – that Congress understands that "jurisdiction" is the term of art to be used when limiting the types of cases which a federal court is authorized to hear.[31] No such reference to the jurisdiction of the federal courts is to be found in section 701(b).

That omission is all the more telling because elsewhere in Title VII Congress did impose express limitations on federal jurisdiction in a particular type of case. Section 709 requires employers, employment agencies and labor organizations to maintain and provide to the EEOC certain specified records. Under section 709(d) the EEOC or the Attorney General may bring an action to compel compliance with section 709. But section 709(d) is written in such a manner that two limitations on such actions – the district in which they can be brought (usually a matter of venue) and the plaintiffs which can bring them (ordinarily a matter of prudential standing) – are expressly part of the jurisdictional grant.

> If any person required to comply with the provision of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

42 U.S.C. § 2000e-8(d).

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the Court of International Trade), 1347 (jurisdiction if United States is a tenant), 1350 (jurisdiction only over tort claims).

[31] *See Shendock v. Director, Office of Workers' Compensation Programs*, 893 F.2d 1458, 1462-64 (3d Cir. 1990).

The specific issue in the instant case is whether jurisdiction to hear Title VII claims is limited to actions against particular defendants, those with the requisite fifteen or more employees. The grant of jurisdiction in section 706(f)(3), of course, contains no defendant-specific restriction. But in other statutes Congress has expressly confined the creation of federal jurisdiction to actions against particular defendants. A large number of federal statutes establish jurisdiction if the defendant is the United States;[32] other provisions create jurisdiction over claims against a variety of specified officials,[33] certain private individuals or entities,[34] and particular agencies.[35] Jurisdiction under the Uniformed Services Employment and Reemployment Rights Act is expressly limited to

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[32] *E.g.*, 5 U.S.C. §§ 8715, 8912, 8961, 8991.

[33] 25 U.S.C. §§ 450m-1(a) (certain cabinet secretaries), 715(d)(9)(A) (Secretary of the Interior); 28 U.S.C. § 1351 (consular officials); 42 U.S.C. § 4072 (Director of Federal Emergency Management Agency); 49 U.S.C. § 49110 (officials of the Washington Airports Authority).

[34] *E.g.*, 15 U.S.C. § 2707(g) (persons subject to orders of the Egg Board); 28 U.S.C. §§ 1348 (national banking associations), 1364(a) (insurers of foreign consular officials).

[35] *E.g.*, 7 U.S.C. §§ 1506(d) (Federal Crop Insurance Corporation), 2106(g)(6) (Cotton Assessment Board), 3405(g) (Wheat Board); 15 U.S.C. § 714b(c) (Commodity Credit Corporation); 16 U.S.C. § 450ss-4(f) (Oklahoma City National Memorial Trust); 22 U.S.C. §§ 282f (International Finance Corporation), 283f (Inter-American Development Bank), 283gg (Inter-American Investment Corp.), 284f (International Development Association), 285f (Asian Development Bank), 286g (International Monetary Fund), 290g-6 (African Development Fund), 290i-7 (African Development Bank), 290k-9 (Multilateral Investment Guarantee Agency), 2901-5(a) (European Bank for Reconstruction and Development), 290m(g) (North American Development Bank), 290o-5(a) (Middle East Development Bank); 28 U.S.C. § 1330(a) (a foreign state); 39 U.S.C. § 409(a) (Postal Service).

"employers" and "States" as employers,[36] both terms having specific statutory definitions.[37] In these cases the failure of a plaintiff to name the requisite type of entity as a defendant would (at least presumptively) be a jurisdictional defect. But Congress included no such defendant-specific restriction in section 706(f)(3).

Federal jurisdiction over Title VII claims is established not only by section 706(f)(3), but also by the general grant of federal question jurisdiction under 28 U.S.C. § 1331. A case such as this clearly "arises under" federal law within the meaning of section 1331, since the complaint asserts that federal law, specifically Title VII, creates both the prohibition allegedly violated and the cause of action to enforce that prohibition. Title VII did not repeal in this respect the broad grant of jurisdiction in section 1331.[38] The express jurisdictional provision in section 706(f)(3) is entirely consistent with section 1331. The non-jurisdictional terms of section 701(b) cannot be relied on to modify the plain language of section 1331;

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[36] 38 U.S.C. §§ 4323(b)(1) ("In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action"), 4323(b)(3) ("In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.") (2005 Supp.).

[37] 38 U.S.C. §§ 4303(4) (definition of employer), 14 (definition of a state). The statutory grant of jurisdiction would not encompass an action against the federal government or a foreign government, or against a private entity all of whose workers were independent contractors.

[38] This case provides no occasion to address whether the far more specific terms of section 709(d) may have limited the grant of jurisdiction in section 1331.

repeals by implication are not favored. *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003).

Treating the employee numerosity-requirement as jurisdictional would raise problems under the 1991 Civil Right Act, which established a right to jury trials in any Title VII case in which a plaintiff (as in this case) sought compensatory or punitive damages for intentional discrimination. 42 U.S.C. § 1981a(c)(1). The 1991 Act did not merely incorporate the Seventh Amendment right to jury trial, but expressly created a statutory right whose scope is not necessarily limited by the constitutional right to a jury trial. It is unclear how factual questions raised by the application of any jurisdictional requirement could be resolved in light of that jury trial right.[39] Referring to a judge factual disputes regarding the employee-numerosity requirement would derogate the statutory right to a jury trial in a manner Congress is unlikely to have foreseen or intended. On the other hand, if because of section 1981a(c)(1) a jury's resolution of those factual issues *were* needed to resolve the jurisdiction of the court, the court would be required either to empanel at the outset of the case a special jury for the sole purpose of resolving those jurisdictional issues, or to postpone resolving that jurisdictional issue until after the trial on the merits. Factual issues regarding whether a particular plaintiff is a Title

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[39] The appropriate role of juries in determining factual issues related to jurisdiction is unsettled. *See* C. Wright and M. Kane, *Law of Federal Courts*, pp. 164-65 and n.12, 198-99 and n.7, 483 and n.26 (6th ed. 2002); *Gilbert v. David*, 235 U.S. 561, 568 (1915); *Note, Trial By Jury of Jurisdictional Facts in Federal Courts*, 48 Iowa L. Rev. 471 (1963); Comment, "The Right to A Jury Trial For Jurisdictional Issues", 6 Cardozo L. Rev. 149 (1984); S DiTrolio, "Undermining and Unintwining: The Right to A Jury Trial and Rule 12(b)(1)", 33 Seton Hall L. Rev. 1247 (2003).

VII employee, and thus protected by the statute, are clearly matters for determination by a jury; it would be incongruous if the identical factual issues were instead to be resolved by a judge because they affected how many employees the defendant employed. A constitutional problem would arise if a defendant asserted both that a category of workers that included the plaintiff were not employees protected by Title VII, and that – excluding those workers – the employer did not have the requisite fifteen employees. If that contention rested on disputed issues of fact, judicial determination of those facts would impermissibly preclude a jury determination of those issues. *See Beacon Theaters v. Westover*, 359 U.S. 500 (1959). Treating the employee-numerosity requirement as non-jurisdictional avoids all of these problems.[40]

If the employee-numerosity requirement in section 701(b) itself imposes a limitation on subject matter jurisdiction, that limitation (like the substantive requirement itself) would be applicable to Title VII claims brought in state as well as federal court. Plaintiffs with Title VII claims may opt to proceed in state court if they think that forum more advantageous;[41] Title VII suits are authorized

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[40] *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) (because FMLA employee-numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997) (because ADEA employee-numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Martin v. United Way of Erie County*, 829 F.2d 445, 451 (3d Cir. 1987) (because Title VII employee-numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so).

[41] *See, e.g., Alcorn v. City of Baton Rouge*, 898 So. 2d 385 (La. App. 1 Cir. 2004) (Title VII claim); *Taylor v. L.S.U. Medical Center*, 892 So. 2d 581 (La. App. 2d Cir. 2004) (Title VII claim).

in state courts because of "the presumption of concurrent jurisdiction that lies at the core of our federal system." *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 826 (1990). If, however, the section 701(b) employee-numerosity requirement were jurisdictional, state courts hearing Title VII claims would themselves have to follow in this regard the often wasteful and burdensome procedures applicable to federal jurisdictional rules. Those state courts, for example, would be obligated to disregard state procedural rules regarding deadlines for and waivers of objections to the allegations of a complaint. It is exceedingly unlikely that Congress intended to interfere in this manner with the internal operations of state courts, and equally unlikely that Congress would have wanted to impose on federal courts procedural burdens from which state courts had been spared.

III. TREATING THE EMPLOYEE-NUMEROSITY REQUIREMENT AS JURISDICTIONAL WOULD BE INCONSISTENT WITH THE EFFECTIVE ADMINISTRATION OF TITLE VII

When Congress has imposed limitations on subject matter jurisdiction, it generally has utilized restrictions unlikely to raise factual issues; the most common such limitations appear to be actions brought within a specified period of time and to actions commenced by the United States. This Court has avoided factual disputes about jurisdictional amount requirements, such as the $75,000 requirement for diversity cases, by insisting that jurisdiction can be defeated only by showing that it is a legal certainty that the plaintiff cannot recover that amount. *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 276 (1977). Litigation regarding whether an employer has a particular number of employees, on the other hand,

frequently turns on the results of a complex and detailed factual inquiry. Judicial administration of such an unusual fact-bound jurisdictional requirement would interfere with the efficient administration of the law to a degree that Congress is unlikely to have intended.

A. Litigation Of The Employee-Numerosity Requirements Frequently Turns On Complex Factual Determinations

Litigation under Title VII and other statutes with employee-numerosity requirements frequently gives rise to detailed discovery and fact-finding, driven by several complex sets of applicable legal standards.

Section 701(b) on its face requires a review of employment records for two entire calendar years, both the year in which the discrimination allegedly occurred and the prior year.[42] This Court's decision in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), although somewhat simplifying that process, nonetheless requires access to and a review of an employer's payroll records. Neither the plaintiff prior to filing suit and taking discovery, nor the court required to assure itself of subject matter jurisdiction, would ordinarily have such information.

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[42] There will, of course, be instances in which there could be no serious dispute that the employer did not have the requisite fifteen employees, such as an employer which had never had that many workers at any time during the relevant two year period. Such easy cases, however, are unlikely ever to reach court. The EEOC regulations require a charging party to state the number of employees who worked for the employer. 29 C.F.R. § 1601.12(a)(4). The model Charge Questionnaire issued by the Commission asks the charging party to state the "approx[imate] no. employed by this employer." EEOC Form 283, Charge Questionnaire (12/93).

Even after discovery, factual disputes could exist regarding the number of employees working in the years in question.[43]

Actual litigation regarding section 701(b) usually turns on additional, even more complex factual issues. Frequently a defendant contends that some of its workers are not "employees" within the meaning of Title VII, but instead only independent contractors.[44] That was one of the central issues in the lower courts in this case.[45] In determining whether a worker is an employee or an independent contractor, the Fifth Circuit applies a legal standard that encompasses *nineteen* different factual factors.[46] In *Nationwide Mutual Insurance Co. v. Darden*,

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[43] *E.g.*, *Burdett v. Abrasive Engineering & Technology, Inc.*, 989 F.Supp. 1107, 110-12 (D.Kan. 1997) (summary judgment denied because of the existence of questions of fact regarding the accuracy of the employer's records); *Guadagno v. Wallack Ader Levithan Assoc.*, 932 F.Supp. 94, 96-98 (S.D.N.Y. 1996) (same).

[44] The lower courts are in disagreement regarding whether, or when, unpaid volunteers should count as employees. 2 B. Lindeman and P. Grossman, *Employment Discrimination Law*, p. 1306 n.161 (1996).

[45] App. 10-18, 32-38.

[46] The Fifth Circuit considers 8 factors bearing on "the extent of the employer's right to control the 'means and manner' of the workers' performance" (App. 12):

> The factors pertinent to this inquiry include:
>
> (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of job commitment; (7) form of payment; and (8) directions on schedules and on performing work.

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503 U.S. 318, 323-24 (1992), this Court announced a fourteen part test for determining who is an "employee" under ERISA. *See* 503 U.S. at 324 (noting Revenue Ruling identifying twenty factors for deciding whether an individual is an employee in certain tax law contexts). Whatever the precise standard, the court below was assuredly correct in observing that "determining whether an individual is an 'employee' for Title VII purposes is a fact-intensive inquiry," one in which ordinarily "there are facts pointing in both directions." (App. 17).

Whether an employer has the requisite fifteen employees may also turn, as it did in the instant case,[47] on whether some of the individuals who performed services and received payment should be considered as the employer itself, rather than as employees. That question arises in a wide variety of factual and legal settings. In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538

(App. 12). That circuit also evaluates 11 other "additional factors":

> "(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer;" (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

(App. 16) (*quoting Broussard v. L.J. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986)).

[47] App. 18-21, 38-44.

U.S. 440, 450 (2003), this Court identified six specific factors that bear on that determination,[48] and added that the list was not exhaustive[49] and that the answer depends on "all of the incidents of the relationship . . . with no one factor being decisive." 538 U.S. at 451 (*quoting Darden*, 503 U.S. at 324).

The application of Title VII may also be governed by whether an employer with less than fifteen employees is so inter-related with another employer that they should be treated as a single entity, and the number of their employees aggregated. This issue arises with regard to multiple small offices (e.g., travel agencies, funeral homes) and with regard to a smaller entity affiliated with a larger employer (e.g., a local union and the international union with which it is connected.)[50] The EEOC has proposed a

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[48] 538 U.S. at 449-450:

> "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
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> "Whether and, if so, to what extent the organization supervises the individual's work
>
> "Whether the individual reports to someone higher in the organization
>
> "Whether and, if so, to what extent the individual is able to influence the organization
>
> "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> "Whether the individual shares in the profits, losses, and liabilities of the organization."

(*quoting* EEOC Compliance Manual § 605.0009).

[49] 538 U.S. at 450 n.10.

[50] For examples of such cases, *see* 150 A.L.R. Fed. 441 (Propriety of Treating Separate Entities As One For Determining Number of Employees Required by Title VII of Civil Rights Act of 1964).

fourteen part test for determining whether such an arrangement constitutes an integrated enterprise.[51]

The resolution of such issues will normally require, at the least, considerable discovery. In the instant case five months of discovery, analysis and briefing were required before the district court could reach a decision.[52] In *Doe v. Goldstein's Deli*, 82 Fed. Appx. 773 (3d Cir. 2003), litigation over the employee-numerosity issue involved extensive discovery and briefing and a four day evidentiary hearing with fourteen witnesses. 82 Fed. Appx. at 774. In a number of cases, motions to dismiss Title VII claims for lack of employee-numerosity have taken more than a year to resolve.[53]

B. Treating The Employee-Numerosity Requirement As Jurisdictional Would Interfere With The Efficient Administration Of Title VII

Treating the fact-bound employee-numerosity requirement as jurisdictional would impose undue burdens on both federal courts and Title VII claimants.

If the employee-numerosity requirement limits the subject matter jurisdiction of the court, the court itself

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[51] EEOC Compliance Manual, part 2-III(B)(a)(iii)(a). This part of the Compliance Manual is available at http://eeoc/gov/policy/docs/threshold.html.

[52] The motion to dismiss was filed on November 19, 2002, and decided on April 4, 2003.

[53] *Da Silva v. Kinsho International Corp.*, 210 F.Supp. 241, 242 (S.D.N.Y. 2000) (motion filed February 17, 1998; motion granted January 4, 2000); *Scarfo v. Ginsberg*, 175 F.3d 957, 959-60 (11th Cir. 1999) (motion filed January 23, 1995; motion granted June 17, 1997).

would be obligated to inquire into that issue to assure that it had jurisdiction. But in cases in which the requisite fifteen employees might be lacking, courts would rarely have available the detailed information needed to ascertain whether that requirement was met, or even that a problem might exist. Absent a motion by the defendant, a federal judge would ordinarily know little if anything about the approximate number of employees who worked for a defendant, and could not identify those cases in which section 701(b) might not be satisfied.

> Such a holding would require a federal court to determine whether a company had fifteen employees during the relevant period, even if the parties so stipulated. To require a federal court to engage in such a fact-intensive inquiry *sua sponte* – which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets – appears to be a waste of scarce judicial resources. . . .

Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 83 (3d Cir. 2003), *cert. denied*, 541 U.S. 959 (2004).[54]

Similarly, if the employee-numerosity requirement were indeed jurisdictional, courts would be obligated to address first this often factually complex issue, even though other, less difficult grounds for a decision on the merits might be evident.

> To hold the requirement jurisdictional also implies that a court would need to decide whether

[54] *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998) ("Surely the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail.").

> an entity employed more than fifteen individuals before reaching a Title VII action's merits – even if the merits were more easily resolved than the "jurisdictional" question.

Nesbit v. Gears Unlimited, Inc., 347 F.3d at 83. The detailed discovery and complex legal and factual issues involved in the instant case regarding the employee-numerosity requirement assuredly consumed far more litigant and judicial resources than would at least usually be needed to determine, for example, whether an administrative charge had been filed within the applicable deadline following the alleged discriminatory act.

Were the employee-numerosity requirement jurisdictional, the courts would be obligated, once it was raised, to resolve that jurisdictional issue before proceeding further with the case. The litigation would in effect be bifurcated, with discovery, motions and a hearing (if appropriate) regarding employee-numerosity first, followed (if the requisite fifteen employees were present) by a separate round of discovery, motions and trial on the merits. The inevitable delays that would occur by proceeding in that awkward manner would be inconsistent with the statutory direction that Title VII actions "be in every way expedited." 42 U.S.C. § 2000e-5(f)(5).

The employee-numerosity requirement, if jurisdictional, could be raised at any time, including after the merits of the Title VII claim have been tried to judgment. That is precisely what occurred in the instant case. The district court correctly observed that "It is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." (App. 47). In

the instant case the delay in raising the employee-numerosity issue may have been merely an oversight of counsel. But if the jury had returned a verdict for the defendant on all the claims, counsel for defendant assuredly would not have come forward after trial to object to a lack of jurisdiction and suggest a dismissal of the state claims without prejudice.[55] There are, moreover, some circumstances in which a defendant might conclude it was tactically desirable to postpone raising a non-waivable jurisdictional issue until after trial.[56]

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[55] In *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 353, 360 (2d Cir. 2000), the defendant prior to trial moved to dismiss, urging that the employee-numerosity requirement was jurisdictional. On the day of trial, the court concluded that the requisite fifteen employees were not present, but permitted the supplemental state law claim to proceed to trial. The jury found for the defendant on that state law claim. On appeal, the defendant reversed its earlier position and argued that the employee-numerosity requirement was *not* jurisdictional, in order to preserve the victory it had won at trial on the merits of that state law claim.

[56] *See, e.g., Westphal v. Catch Ball Products Corp.*, 953 F.Supp. 475, 477 (S.D.N.Y. 1997) (motion to dismiss for lack of jurisdiction based on number of employees filed during trial).

Federal Title VII claimants frequently raise supplemental state law claims; many of those claims provide remedies at least as desirable as Title VII and most are not subject to a fifteen-employee requirement. If such a case were dismissed in federal court because of the absence of the requisite fifteen employees, the plaintiff (relying on the tolling provision in 28 U.S.C. § 1367(d)) could simply refile the case in state court. Thus asserting this issue at the outset of the litigation may achieve little other than a change of forum. By delaying raising a jurisdictional issue until after trial, a defendant would get two bites of the apple. It could first seek to win a decision on the merits of both the federal and state claims; if, however, the jury returned a verdict for the plaintiff, the defendant could then raise a jurisdictional issue, force dismissal of the entire federal proceeding, and (if the plaintiff had the resources to start all over in state court) have a second opportunity in state court to try the merits of the controversy.

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It is important that a plaintiff be able to assess prior to filing suit whether his or her claim might face a serious jurisdictional problem in federal court. Many potential federal plaintiffs have viable state claims over which the state courts themselves would clearly have jurisdiction. If serious jurisdictional problems were likely in federal court, a plaintiff might well prefer to initiate his or her claim in state court, rather than risk additional delays and costs involved in federal litigation. But the facts bearing on whether an employer has the requisite fifteen employees will often turn on evidence that a plaintiff could only learn through discovery after filing the complaint. The disposition of the employee-numerosity question in the instant case rested on such confidential information as the tax records of fellow employees and the extent to which wives of the owners, who worked at home for the corporation, were supervised there by their husbands.

Treating the Title VII employee-numerosity requirement as jurisdictional would create additional problems where a plaintiff also asserts related state law claims. Plaintiffs bringing Title VII claims in federal court often include such state law claims. Those state claims may be

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If a plaintiff brought suit in federal court only under Title VII, claim preclusion would usually bar that employee from subsequently bringing in state court a state law claim arising out of the same employment actions. Restatement of the Law (Second) Judgments, § 24 (1982). Claim preclusion, however, would not apply if the earlier federal action were dismissed for lack of subject matter jurisdiction. *Id.*, § 26. Thus a defendant wishing to take advantage of claim preclusion would have a significant incentive to refrain at least initially from disputing the existence of employee numerosity, and to rely instead only on non-jurisdictional defenses; the court, on the other hand, would be obligated to raise first on its own the very jurisdictional bar that the defendant preferred not to assert.

important because, in comparison with Title VII, state law frequently provides more expansive remedies, involves less demanding standards of proof, or imposes less stringent procedural barriers. Claims under Louisiana's anti-discrimination law, for example, are not subject to the caps applicable to compensatory and punitive damages under Title VII.[57]

Such state claims would not fail on the merits merely because a related Title VII claim was rejected on the ground that the supplemental employer did not have the requisite fifteen employees. Most state law claims are not themselves dependent on a showing that the employer has fifteen employees; thirty-five states and the District of Columbia have enacted anti-discrimination laws applicable to smaller employers.[58] In determining whether state employee-numerosity requirements are met, individual states may follow their own common law (or, in this case, civil law) definition of "employee." In addition, the conduct giving rise to a Title VII claim may also constitute a tort under state law; Title VII sexual harassment claims, for example, are frequently joined with state law claims for intentional infliction of emotional distress.[59]

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[57] 42 U.S.C. § 1981a; La. Rev. Stat. § 23:303(A) (no limit on compensatory, but the statute does not authorize punitive damages).

[58] A list of those statutes is set forth in an Appendix to this brief.

At the time this action arose, the Louisiana anti-discrimination law was applicable to employers with twenty or more employees. La. Rev. Stat. § 23:302(2) (1998).

[59] *Clinton v. Jones*, 520 U.S. 681, 685 (1997); *Pollard v. E.J. du Pont de Numours & Co.*, 213 F.3d 933, 937 (6th Cir. 2000), *rev'd*, 532 U.S. 843 (2001); P. Lindemann and D. Kadue, *Sexual Harassment in Employment Law*, pp. 138 *et seq.* (1992); P. Lindemann and D. Kadue,

(Continued on following page)

If a plaintiff asserting both a Title VII and a state law claim were to prevail on the latter at trial, the subsequent rejection of the federal claim *after* trial for lack of employee-numerosity would leave the state law verdict unaffected so long as the defect in the federal claim was non-jurisdictional. *See, e.g., Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000).[60] But if the employee-numerosity requirement is jurisdictional, then the court in such a case would also lack subject matter jurisdiction over the supplemental state law claim, no matter how closely related to the original federal claim, and any verdict on the state law claim – which itself might have had no fifteen employee requirement – would also have to be set aside.[61] In the instant case, the jury which

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1999 *Cumulative Supplement, Sexual Harassment in Employment Law*, pp. 138-46.

[60] If both the Title VII and state law claims were tried on the merits, the decision on the merits of the state law claim would be unaffected by a determination that the employer did not have the requisite fifteen employees. If prior to trial the Title VII claim were dismissed on that ground, the district court would have discretion to dismiss the state law claim or to resolve it on the merits. If the state law claim were dismissed because of the failure of the Title VII claim, the state law claim could be filed in state court under the tolling provision of 28 U.S.C. § 1367(d).

[61] *See Nowak v. Iron Workers Local 6 Pension Fund*, 81 F.3d 1182, 1186 (2d Cir. 1996) ("Insofar as the district court previously determined that there was no original federal subject matter jurisdiction over the suit, it could not exercise supplemental jurisdiction over Nowak's state claims.") In *Nowak*, the court of appeals concluded that the defect in the plaintiff's underlying ERISA claim was not jurisdictional, and that the exercise of supplemental jurisdiction was therefore permissible.

Conversely, in *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604 (6th Cir. 1998) the Sixth Circuit held that a district judge could not exercise supplemental jurisdiction over such a state claim because the lack of the requisite number of employees to support the federal FMLA claim deprived the court of subject matter jurisdiction.

upheld petitioner's Title VII and state anti-discrimination claim rejected her state tort claim. The district court, believing that the lack of employee-numerosity meant there was no federal jurisdiction, set aside the verdicts on both those state law claims and dismissed them without prejudice. (App. 23). If the dismissal of the Title VII claim were upheld by this Court, the tolling provision of 28 U.S.C. § 1367(d) would then apply, and petitioner could refile her state anti-discrimination and tort claims in Louisiana court, and would there be required to relitigate her state discrimination claim and be permitted to relitigate her state tort claim without regard to the 2002 federal jury verdict in this case.

If a Title VII claim were dismissed *prior* to trial for some reason related to the merits, that would not require that the state law claim be dismissed. The federal court would retain discretion to resolve that state law claim on the merits, and might well do so, for example, if the discovery was largely complete. The longer the federal claim had been pending before it was dismissed, the greater the likelihood that the court would retain jurisdiction over and resolve the related state law claim.[62] If, however, the underlying federal claim were dismissed for lack of subject matter jurisdiction, the related state claim would have to be dismissed, no matter how great the resulting delay and waste of judicial resources.

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[62] *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 364 (2d Cir. 2000); *Dody v. Oxy US, Inc.*, 101 F.3d 448, 456 (5th Cir. 1996); *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994); *Imagineering, Inc. v. Kiewit, Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1992).

In construing the statute in *Steel Company v. Citizens for a Better Environment*, this Court refused to conclude that Congress intended the statutory requirements there in question to be jurisdictional because the result would be "such a strange scheme." 523 U.S. at 93. Construing section 701(b) to limit subject matter jurisdiction would be equally inconsistent with the effective administration of Title VII.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

ANTI-DISCRIMINATION STATUTES APPLICABLE TO EMPLOYERS WITH FEWER THAN 15 EMPLOYEES

ALASKA STAT. § 18.80.220 (2004) (1 employee)

ARK. CODE ANN. § 16-123-102(5) (2005) (9 employees)

CAL. GOV. CODE § 12926(d) (2005) (5 employees)

COLO. REV. STAT. ANN. § 24-34-401(3) (2005) (1 employee)

CONN. GEN. STAT. § 46a-51(10) (2005) (3 employees)

DEL. CODE ANN. tit. 19 § 710(6) (2005) (4 employees)

D.C. CODE ANN. § 2-1401.02(10) (2005) (1 employee)

HAW. REV. STAT. § 378-1 (2004) (1 employee)

IDAHO CODE § 67-5902(6) (2005) (5 employees)

ILL. ANN. STAT. ch. 775, para. 5/2-101(B)(1)(b) (2005) (1 employee if discrimination involves sexual harassment)

IND. CODE § 22-9-1-3 (2005) (6 employees)

IOWA CODE § 216.7(6)(a) (2005) (4 employees)

KAN STAT. ANN. § 44-1002(b) (2004) (4 employees)

KY. REV. STAT. ANN. § 344.030(2) (2004) (8 employees)

ME. REV. STAT. ANN. tit. 5, § 4553(4) (2005) (1 employee)

MASS. GEN. LAWS ANN. ch. 151B § 1(5) (2005) (6 employees)

MICH. COMP. LAWS ANN. § 37.2201(a) (2005) (1 employee)

MINN. STAT. § 363A.03, subd. 16 (2005) (1 employee)

MO. ANN. STAT. § 213.010(7) (2005) (6 employees)

MONT. CODE ANN. § 49-2-101(11) (2003) (1 employee)

N. H. REV. STAT. ANN. § 354-A:2 (2004) (6 employees)

N. J. STAT. ANN. § 10:5-5(e) (2005) (1 employee)

N. M. STAT. ANN. § 28-1-2(B) (2005) (4 employees)

N. Y. EXEC. LAW § 292(5) (2005) (4 employees)

N. D. CENT. CODE § 14-02.4-02(7) (2003) (1 employee)

OHIO REV. CODE ANN. § 4112.01(A)(2) (2005) (4 employees)

OR. REV. STAT. § 659A.001(4) (2003) (1 employee)

PA. STAT. ANN. tit. 43, § 954(b) (2005) (4 employees)

R.I. GEN. LAWS § 28-5-6(7)(i) (2004) (4 employees)

S. D. CODIFIED LAWS ANN. § 20-13-1(7) (2005) (1 employee)

TENN. CODE ANN. § 4-21-102(4) (2005) (8 employees)

VT. STAT. ANN. tit. 21, § 495 (2004) (1 employee)

WASH. REV. CODE ANN. § 49.60.040(3) (2005) (8 employees)

W. VA. CODE § 5-11-3(d) (2005) (12 employees)

WIS. STAT. § 111.32(6)(B) (2005) (1 employee)

WYO. STAT. § 27-9-102(b) (2004) (2 employees)

No. 04-944

SUPREME COURT
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In The
Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

vs.

Y & H CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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STATEMENT OF THE CASE

On November 8, 2001, petitioner Jennifer Arbaugh filed a Complaint in the United States District Court for the Eastern District of Louisiana, naming as defendants her former employer, Y & H Corporation (hereinafter "Y & H") and one of its owners. Plaintiff alleged sexual harassment leading to her constructive discharge and sought relief under Title VII of the 1964 Civil Rights Act, Louisiana's anti-discrimination statute[1] and Louisiana's general tort law.[2] (App. 24).

Plaintiff asserted the federal jurisdiction of the district court pursuant to 28 U.S.C. §§1331 and 1367. This allegation of subject matter jurisdiction was admitted by defendants in their answer. Plaintiff, however, did not specifically allege in her Complaint that Y & H met the statutory definition of employer contained in Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. §2000e(b), nor did she allege anything relative to the number of employees Y & H "had" for any relevant time period. (App. 46).

A jury trial of plaintiff's action was conducted before the Magistrate Judge beginning on October 28, 2002. During the presentation of her case, plaintiff presented no evidence concerning the number of Y & H's employees. At the conclusion of plaintiff's case, defendants made a Motion for Judgment as a Matter of Law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. This Motion was denied by the district court and the case was submitted to the jury. The jury found for plaintiff and against

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[1] La.R.S. 23:301, *et seq*.

[2] La. Civil Code Art. 2315.

Y & H on the Title VII and Louisiana anti-discrimination claims while denying her claims under Louisiana tort law. The district court entered judgment for plaintiff on November 5, 2002. (App. 45-49).

Defendant timely filed a Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion for New Trial and/or Remittur as well as a Rule 12(h)(3) Motion to Dismiss for Lack of Subject Matter Jurisdiction. Defendant asserted that it did not qualify as a Title VII employer as defined in Section 701(b) since it did not have fifteen or more employees for each working day in each of twenty or more calendar weeks in the year of the alleged violation or the preceding year. Defendant maintained that this failure deprived the district court of subject matter jurisdiction pursuant to controlling jurisprudence of the Fifth Circuit. (App. 45-49).

Plaintiff responded to defendant's Motion to Dismiss by contending 1) that defendants had admitted jurisdiction; 2) that delivery drivers who were not included on Y & H's payroll records should have been counted as employees; and 3) that Y & H's owners should have been counted as employees. (App. 47).

The district court rejected plaintiff's first contention, based upon the firmly established principle that subject matter jurisdiction can neither be waived nor created by consent and may be raised at any time. As to plaintiff's other two contentions, the court allowed plaintiff to conduct discovery in order to give plaintiff the opportunity to meet the burden of showing the existence of subject matter jurisdiction. The court further ordered the parties to file supplemental memoranda upon the completion of this discovery. (App. 47-49).

In her supplemental memorandum following the discovery, plaintiff maintained her contentions that the delivery drivers and owners were employees of Y & H. To make a complete record relative to plaintiff's arguments regarding Y & H's owners, the district court ordered the parties to submit supplemental memoranda with exhibits identifying what compensation, if any, was paid to the owners of Y & H in 2001. (App. 24-44).

After reviewing all memoranda and evidence submitted by the parties, the district court concluded that neither the delivery drivers nor the owners of Y & H qualified as employees for Title VII purposes. Thus, Y & H did not have the requisite fifteen or more employees to qualify as an employer per the definition provided in Section 701(b). Accordingly, the district court ruled that it lacked subject matter jurisdiction, vacated its prior judgment in favor of plaintiff and dismissed plaintiff's Title VII claims with prejudice and her Louisiana claims without prejudice. The district court further ordered defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion for New Trial and/or Remittur dismissed as moot.[3] (App. 23-44).

Plaintiff timely appealed to the Fifth Circuit, contending for the first time that the numerosity requirement of

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[3] Petitioner repeatedly suggests in her brief that if the numerosity requirement of Section 701(b) is an element for the merits of a Title VII claim, then defendant waived the issue by not raising it prior to or at trial. Arbaugh Br. 4 and 7. While this issue of waiver is not before the Court, Respondent must note that it does not concede this point. Should this Court find that a failure of numerosity is not a failure of jurisdiction, the district court would then have to rule on the Renewed Motion for Judgment as a Matter of Law. It would be for the district court to determine whether Y & H had waived any issues related to the merits.

Section 701(b) is not jurisdictional and repeating her assertions that the drivers and owners were employees of Y & H. The Fifth Circuit panel rejected plaintiff's contentions, holding that employee-numerosity is jurisdictional and that the district court was not clearly erroneous on its determination of the status of the drivers and owners. (App. 1-22). The Fifth Circuit denied plaintiff's request for an en banc rehearing on October 13, 2004. This Court granted certiorari on May 16, 2005.

SUMMARY OF ARGUMENT

Section 701(b) of the 1964 Civil Rights Act limits the coverage of Title VII to those businesses which have fifteen or more employees for each working day in each of twenty or more calendar weeks in the year of alleged discriminatory conduct or the year before such conduct. Based upon a formalistic analysis of §701(b) and speculation that declaring §701(b) would impair the efficient enforcement of Title VII, petitioner maintains that §701(b) cannot be considered a prerequisite to subject matter jurisdiction but is merely an element of a plaintiff's Title VII claim.

Petitioner's argument is flawed as it fails to account for the limited nature of federal courts' subject matter jurisdiction. As federal courts only possess that jurisdiction which is marked out by the Constitution and Congress, via statute, determination of the scope of courts' subject matter jurisdiction under Title VII requires deductions drawn from the relevant statutes as to whether Congress desired to give the courts jurisdiction over small business.

This Court's jurisprudence concerning §701(b) has consistently referred to the employee numerosity requirement as one which limits the coverage of Title VII. Furthermore, the Court has referred to a failure to meet the minimum employee requirement as a failure of jurisdiction and has also referred to the definition of employer contained in §701(b) as a jurisdictional term. These cases have demonstrated a recognition by this Court that Congress did not intend for the federal courts to have jurisdiction over the small businesses which the numerosity requirement was designed to protect.

Furthermore, petitioner's citation to cases which declared that not every element of a cause of action create a jurisdictional requirement involve cases distinguishable from the issue presented herein. None of the cases cited by petitioner involve requirement which address the very scope of the coverage of the act in question. The exclusion created in §701(b) establishes complete immunity for small businesses from Title VII. Unlike the situations in the cases cited by petitioner, the issue under the numerosity requirement is not whether a defendant small employer is liable for particular actions – it cannot be because it is simply not regulated by Title VII.

Finally, petitioner suggests that a jurisdictional reading of §701(b) will impair the efficient administration of Title VII. Both history and logic undermine this suggestion. Circuits have viewed §701(b)'s requirements as jurisdictional for decades but petitioner cannot point to significant problems which have arisen. Additionally, petitioner's speculation that a jurisdictional approach will lead to defense attorney's sandbagging the jurisdictional issue to obtain two opportunities at victory ignores the normal desire any defendant would have to terminate

litigation as quickly and cheaply as possible. Petitioner's merits based approach, on the other hand, would result in small businesses being deprived of the protection which Congress has given through the numerosity requirement.

ARGUMENT

I. INTRODUCTION

Petitioner Jenifer Arbaugh presents this Court with the question of whether Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. §2000e(b), which defines "employer" as only those who have fifteen or more employees limits the subject matter jurisdiction of federal courts or only raises an issue going to the merits of a Title VII claim. In urging this Court to find that this numerosity requirement is only an issue going to the merits, Petitioner relies upon 1) a formalistic analysis of §701(b) vis-a-vis §706(f)(3) of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5(f)(3)[4] and 28 U.S.C. §1331[5] and 2) speculation that a jurisdictional view of §701(b) would impair the effective administration of Title VII.

As one would expect, petitioner begins her discussion of the issue herein with a general overview of the nature of subject matter jurisdiction, the nature of the power, the ability of a party to withhold the objection until after trial

[4] Each United States district court and each United States Court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

[5] The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

and the consequences of the absence of subject matter jurisdiction. Arbaugh Br. 10. Respondent has no quarrel with petitioner's discussion of these general principles. Lacking from this discussion, however, is the crucial acknowledgment that federal courts, by their very nature, are courts of limited jurisdiction marked out by Congress. *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Without this acknowledgment, petitioner loses sight of the fact that this Court must determine whether Congress has indicated that it wanted to grant jurisdiction in Title VII over small businesses to the federal courts. Further, petitioner fails to recognize that this determination may be made not only based upon the language of the general grant of jurisdiction but also upon "deductions which may be drawn from congressional statutes as to whether Congress wanted to grant" a particular type of jurisdiction to federal courts. *Id.* at 17.

Petitioner's formalistic approach to jurisdiction ignores this Court's prior discussions of §701(b) and the crucial deductions of Congressional intent which can be drawn from these cases. Petitioner's policy discussion ignore the difficulties which would arise if the numerosity requirement were viewed merely as another element of a Title VII claim.

As will be explained in detail below, this Court consistently has addressed §701(b) in jurisdictional terms, emphasizing its role in limiting the coverage of Title VII. Furthermore, the cases petitioner relies upon to support her formalistic analysis of §701(b) involve provisions clearly distinguishable from the numerosity requirement contained therein. Finally, treating §701(b) as simply another element of a merits for a Title VII action would substantially undermine Congress' efforts to protect small

businesses from the expense of Title VII compliance. A jurisdictional approach, on the other hand, would both further this Congressional intent of small business protection and has not and would not hamper the effective administration of Title VII.

II. THIS COURT HAS CONSISTENTLY ADDRESSED THE NUMEROSITY REQUIREMENT OF §701(b) IN JURISDICTIONAL TERMS.

While this Court has not had the occasion to directly answer the question presented by petitioner, it has commented upon §701(b) in at least four cases. In each of these matters, the Court has made clear that numerosity is not "merely one of several elements of the merits of a Title VII claim" as suggested by petitioner. Arbaugh Br. 12. Rather, §701(b)'s requirement that a business have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year is a fundamental requirement without which Title VII has no application.

This Court most recently addressed the numerosity requirement contained in §701(b) in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1998). In *Walters*, the district court had dismissed a Title VII action for lack of subject matter jurisdiction upon the defendants' motion which contended that the defendant company did not employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year as required by §701(b). This Court granted a writ of certiorari directed to the Seventh Circuit Court of Appeals which had affirmed the district court's dismissal.

While the main issue which this Court addressed in *Walters* was whether an employer "has" an employee on days that the employee is employed but not working, the Court's language in discussing the significance of §701(b) is revealing. The opinion starts with the observation that "Title VII of the Civil Rights Act of 1964 **applies to** any employer who 'has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.'" *Id.* at 204 (emphasis added). Later, the Court noted that the defendant therein was "**subject to Title VII**, however, only if, at the time of the alleged retaliation, it met the statutory definition of 'employer' . . . " *Id.* at 205 (emphasis added). Still further in the opinion, the Court rejected the defendant company's proposed method of determining whether an employer "has" an employee on a given day, stating: "On the other hand, Metropolitan's approach produces unique peculiarities of its own: A company that has 15 employees working for it on each day of a 5-day workweek **is covered**, but if it decides to add Saturday to its workweek with only one less than its full complement of employees, **it will become exempt from coverage** . . . " *Id.* at 210 (emphasis added).

Also revealing of this Court's acceptance of the jurisdictional nature of the numerosity requirement is the manner in which this Court remanded *Walters*. After concluding that the district court and the Seventh Circuit had used an improper method to calculate the number of weeks for which the defendant company satisfied the fifteen employee threshold, this Court examined the record and determined that the defendant company was an "employer" within the meaning of §701(b). *Id.* at 212. If, as petitioner contends, §701(b)'s requirement of fifteen employees

was part of a Title VII plaintiff's claim on the merits rather than an element of subject matter jurisdiction, this Court would not have determined that the defendant company in *Walters* was an "employer" given that the plaintiff in *Walters* had not filed a motion for summary judgment on that issue. Rather, this Court would have remanded the matter with instructions that the trier of fact determine the numerosity issue and thus the defendant company's employer status based upon the methodology delineated in this Court's opinion. Given that this Court preempted such an examination and instead determined the employer status of the defendant company in *Walters*, one can conclude that this Court viewed the issue as one of subject matter jurisdiction and thus, appropriate for judicial, rather than jury, determination.

In its amicus brief, the United States discounts the significance of this Court's determination of the numerosity issue in *Walters*, contending that "the parties to that case had apparently stipulated to all relevant facts, leaving no factual disputes for a trier-of-fact to resolve on remand, regardless of whether the question was jurisdictional." U.S. Br. 27. The Government's explanation fails to account for the real impact of this Court's decision upon the parties in *Walters*. Certainly when Metropolitan Educational Enterprises, Inc. filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction in *Walters*, it could not have expected that the result of its motion would have been that an element of the merits of plaintiff's claim would be conclusively established. If, however, as the United States argues, employer status under §701(b) is an element of a Title VII plaintiff's claim on the merits, that is precisely what happened when this Court declared that Metropolitan Educational Enterprises, Inc. was an employer.

In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (hereinafter "*Aramco*") this Court was called upon to decide whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad. As with *Walters*, *Aramco* came before this Court following a district court dismissal of the Title VII claim for lack of subject matter jurisdiction. Also, as with *Walters*, the language of the Court is revealing. First, the Court noted that the petitioners (one of which was the EEOC) argued "that the statute's definitions of the **jurisdictional terms 'employer'** and 'commerce' are sufficiently broad to include U.S. firms that employ American citizens overseas." *Aramco*, *id.* at 248-249 (emphasis added). Further, the Court observed that "[a]n employer **is subject to Title VII** if it has employed 15 or more employees for a specified period . . . " *Aramco*, *id.* at 249 (emphasis added).

The United States downplays the significance of these references contending that this Court was referring to legislative jurisdiction rather than the subject matter jurisdiction of courts, citing Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993). This contention is unsupportable, however, given Justice Scalia's definition of "legislative jurisdiction" in *Hartford* and the question presented in *Aramco*. In *Hartford*, Justice Scalia defined "legislative jurisdiction" as "the authority of a state to make its laws applicable to persons or activities." *Hartford*, *id.* at 813. In *Aramco*, the Court observed:

> Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised

> that authority in this case is a matter of statutory construction. It is our task to determine whether Congress intended the protection of Title VII to apply to United States citizens employed by American employers outside of the United States.

Aramco, id. at 248 (citations omitted). As the authority of Congress was not in question in *Aramco*, this Court would have had no reason to discuss jurisdiction in legislative rather than judicial terms when discussing the scope of Title VII. Rather, by defining its task as determining Congressional intent to extend the protection of Title VII reveals analysis of judicial subject matter jurisdiction.

In *EEOC v. Commercial Office Products Company*, 486 U.S. 107 (1988), this Court addressed questions regarding the time limits for filing charges of employment discrimination with the EEOC and the impact of a state agency's decision to waive its exclusive 60-day period for initial processing of a discrimination charge pursuant to a worksharing agreement with the EEOC. In the course of doing so, a plurality of this Court observed:

> Reactivation of state proceedings after the conclusion of federal proceedings serves the useful function of permitting States to enforce their discrimination laws when these laws are more protective than Title VII. **For example, Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees or against bona fide private membership clubs, §701(b), 42 U.S.C. §2000e(b).**

Commercial Office Products, id. at n.5 (emphasis added).

The United States dismisses this statement as dicta from a plurality. Further, it seeks to make a distinction between the administrative jurisdiction of the EEOC and the subject matter jurisdiction of the federal courts. The Government, however, offers no basis for such a distinction. Given the requirement that a potential Title VII plaintiff file with the EEOC before pursuing litigation, respondent cannot envision any reason why Congress would give the federal courts subject matter jurisdiction over businesses over which it had denied the EEOC jurisdiction.

Finally, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court gave a very clear indication of the significance of the numerosity requirement of §701(b). Rejecting the contention of the law firm which was the defendant in that matter that Title VII exempted partnership decisions from scrutiny, the Court observed that when "Congress wanted to grant an employer **complete immunity**, it expressly did so." *Id.* at 78 (emphasis added). The Court then noted that Congress had expressly exempted small businesses, i.e., those with less than 15 employees, from Title VII, thus granting such complete immunity. *Id.* at n.11.

As noted at the beginning of this discussion, respondent does not suggest that these four cases directly answered the question presented by petitioner. They do, however, powerfully suggest the answer to the question of a federal court's limited subject matter jurisdiction – as framed in *Aldinger*, i.e., did Congress intend to grant the federal court the type of jurisdiction at issue? Given *Hishon's* description of the numerosity requirement as complete immunity, *Walters* and *Aramco's* discussion of employers being "covered" or "subject to" Title VII based

upon §701(b) and *Commercial Office Products'* declaration that the EEOC lacks jurisdiction over small employers, the answer is plainly no.

III. THIS COURT'S DECISIONS DO NOT SUPPORT THE FORMALISTIC APPROACH TO JURISDICTION URGED BY PETITIONER.

Petitioner relies primarily on five decisions of this Court to bolster her formalistic analysis of the jurisdictional requirements of Title VII. Two of these decisions, *Bell v. Hood*, 327 U.S. 678 (1946) and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), do not involve Title VII while the other three, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), *General Electric v. Gilbert*, 429 U.S. 125 (1976) and *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), involve provisions of Title VII unrelated to §701(b)'s numerosity requirement. All are clearly distinguishable from the issue presented herein.

In *Bell*, the petitioners had instituted an action for monetary damages against agents of the Federal Bureau of Investigation contending that their rights under the Fourth and Fifth Amendments had been violated. Defendants sought and obtained dismissal for lack of subject matter jurisdiction contending that 1) petitioners were seeking damages for the state tort of trespass and not under the Constitution and 2) the district court lacked jurisdiction since the Constitution does not expressly provide for recovery of money damages for the violation of the Fourth and Fifth Amendments. On its review, this Court determined that petitioners' complaint clearly sought recovery under the Constitution, thus disposing of defendants' first argument. It was as to the second argument that

this Court held that the possibility that plaintiff might not have a cause of action upon which they might recover does not in itself defeat subject matter jurisdiction as the action still arose under the Constitution or laws of the United States. The Court concluded that it was only where "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" that the case may be dismissed for want of jurisdiction.[6] *Id.* at 682-683.

In *Bell*, there was no dispute that the petitioners were entitled to the protection of the Fourth and Fifth Amendments and that the FBI agents were subject to the limitations on government action imposed by these amendments. Petitioner herein seeks to protect rights of solely statutory creation. As such, Congress, in creating such rights, was free to limit both the scope of such rights and the jurisdiction of the federal courts relative to such rights. Given this Court's statement in *Hishon* that Congress had granted complete immunity from Title VII to small businesses, Congress clearly exercised that freedom to limit the scope of Title VII rights and limitations. Unlike *Bell* where the FBI agents were subject to the Fourth and Fifth Amendments

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[6] Petitioner has observed that Respondent has never contended that the Title VII claim in this matter is so patently groundless as to provide no basis for federal jurisdiction, Arbaugh Br. 11-12, while the United States boldly asserts that petitioner's "Title VII claim is by no means immaterial or frivolous." U.S. Br. 6. As to petitioner's observation, Respondent notes that it has never needed to so label petitioner's Title VII claim given the Fifth Circuit's holdings relative to the jurisdictional nature of §701(b). As to the United States' assertion, respondent would respectfully suggest that it is at least arguable that a Title VII action brought against a small business expressly excluded from the coverage of the Act is frivolous.

and the issue was whether a monetary remedy was available for alleged violations of those amendments, respondent herein and all sub-fifteen employee businesses like it are simply not subject to Title VII in any way.

Steel Co. is distinguishable from the issue presented by §701(b) for much the same reason as *Bell*. Petitioner and the United States rely upon that portion of *Steel Co.* which addressed the issue of whether the absence of a private right of action for purely past violations of the Emergency Planning and Community Right-to-Know Act of 1986 (EPRCA), 42 U.S.C. §11046(a)(1) deprived the district court of subject matter jurisdiction. Relying largely on *Bell*, this Court observed that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction" *Steel Co.*, *id.* at 89. Further, the Court found it "unreasonable to read [EPRCA's jurisdictional provision] as making all the elements of the cause of action . . . jurisdictional." *Id.* at 90.

Like the FBI agents in *Bell*, there was no question that the defendant in *Steel Co.* was subject to the provision of the federal law invoked by the plaintiff. That defendant was undisputably subject to the provisions of EPRCA and the only issue was whether it could be held liable under that act for certain allegedly proscribed conduct. Relative to §701(b), on the other hand, there is no question that a business which employs fewer than fifteen employees cannot be liable under Title VII because Title VII proscribes nothing for those businesses. Where plaintiffs in *Steel Co.* won "under one construction of EPRCA and [lost] under another" *id.* at 89, a plaintiff who sues a business which employs fewer than fifteen employees cannot win under any construction of Title VII.

Petitioner and the United States analogize §701(b) to §706(e) of Title VII, 42 U.S.C. §2000e-5(e), which establishes the time limit for filing a charge with the EEOC and which this Court concluded was not jurisdictional in *Zipes*. Petitioner and the United States rely on this Court's observation in *Zipes* that §706(e) does not speak in jurisdictional terms and was separate from the jurisdictional provision contained in §706(f)(3). Such reliance, however, ignores the full reasoning of this Court in reaching its conclusion as to the non-jurisdictional nature of §706(e). As the Court noted at the beginning of its discussion of the issue, its conclusion was based upon the structure of Title VII, the congressional policy underlying and the reasoning of prior cases. *Id.* at 393. Examining the legislative history, the Court labeled the legislative history as "sparse" but observed that the filing provision had been characterized as a "period of limitation" and "time limitation" with a purpose of preventing the pressing of "stale" claims. *Id.* at 394. In reviewing prior cases which involved the filing requirement, the Court stated that while there were scattered references to the requirement as jurisdictional, more frequently the Court referred to the provision as a limitation statute and more importantly had treated it as such.

In contrast to *Zipes*, as the United States acknowledges in its amicus brief, the legislative history of §701(b) contains references to the provision as jurisdictional. U.S. Br. n.6. Neither petitioner nor the United States cite any legislative history where §701(b) is referred to as simply another element of the merits of a Title VII claim. Furthermore, as discussed above, this Court has consistently both referred to and treated the numerosity requirement

of §701(b) as a matter impacting subject matter jurisdiction.

General Electric and *Espinoza*, the final two decisions of this Court which petitioner cites to bolster her formalistic approach to the jurisdictional requirements of Title VII actually demonstrate the difference between matters which merely go to the merits of a given Title VII claim and §701(b) which concerns the very reach of Title VII. In *General Electric*, this Court held the defendant company did not violate Title VII by offering a health care plan which excluded pregnancy from its coverage. In *Espinoza*, this Court held that the defendant company did not violate Title VII by refusing to employ individuals who were not citizens of the United States. Unlike the situation herein, there was no question in either *General Electric* or *Espinoza* that the defendant companies were subject to the provisions of Title VII. Instead, the question in both cases was whether the actions of the General Electric Company and Farah Manufacturing violated federal law, by unlawfully discriminating.

Petitioner correctly states: "Whether the actions of a defendant actually violated federal law . . . goes to the very essence of the merits of a case." Arbaugh Br. 15. Is it a violation of federal law to refuse to cover pregnancy under a company heath plan is a question for the merits. Is it a violation of federal law to refuse to hire non-citizens is a question for the merits. Since it is clearly not a violation of federal law to employ either more than or fewer than fifteen employees, the question presented by §701(b) cannot go to the very essence of the merits of a case. Neither *Steel Co.* nor *Zipes* change this fact.

IV. A JURISDICTIONAL APPROACH TO THE NUMEROSITY REQUIREMENT OF §701(b) WOULD NOT BE INCONSISTENT WITH THE EFFECTIVE ADMINISTRATION OF TITLE VII.

Petitioner and the United States make a number of policy arguments to suggest that a jurisdictional view of §701(b) would substantially interfere with administration of Title VII. An examination of each of these arguments reveals that they are based upon both faulty assumptions and reasoning. Furthermore, petitioner's analysis ignore the very real difficulties which would arise if the numerosity requirement were treated as just another element of a Title VII claim. Respondent will address petitioner's policy arguments in the order in which they appear in petitioner's brief.

Although it does not appear in the policy section of petitioner's brief, Arbaugh's first "policy" argument is that treating the employee numerosity requirement as jurisdictional "would raise problems under the 1991 Civil Rights Act, which established a right to jury trials in any Title VII case in which a plaintiff . . . sought compensatory or punitive damages for intentional discrimination." Arbaugh Br. 24. According to petitioner, "[r]eferring to a judge factual disputes regarding the employee-numerosity requirement would derogate the statutory right to a jury trial in a manner Congress is unlikely to have foreseen or intended." *Id.* Petitioner's contention concerning Congressional foresight and intent simply ignores historical reality. When Congress enacted the 1991 Civil Rights Act, seven circuit courts had determined the employee-numerosity requirement to be

jurisdictional[7] with only one favoring a merits based approach.[8] Given this fairly uniform state of the law in 1991, it strains credibility to suggest that Congress would not have foreseen that judges would be deciding factual disputes regarding the employee-numerosity requirement so that they could then ascertain whether they had subject matter jurisdiction. As for Congressional intent, surely if Congress was dissatisfied with a jurisdictional approach to the numerosity issue, it could have rectified the situation through clarification of Title VII.

It is revealing to note that in addition to not modifying the employee-numerosity requirement for Title VII in the 1991 Civil Rights Act, Congress created employee-numerosity requirements patterned after §701(b) in the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.* (ADA) and the Family Medical Leave Act of 1993, 29 U.S.C. §2611(4) (FMLA). Given the circuit court's almost uniform view of §701(b) as jurisdictional, it is only reasonable to conclude that Congress intended the employee-numerosity requirements in the ADA and FMLA to be jurisdictional. To now treat §701(b) as a matter for the

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[7] The First Circuit in *Thurbar v. Jack Reilly's, Inc.*, 717 F.2d 633, 635 (1st Cir. 1983), the Fifth Circuit in *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980), the Sixth Circuit in *Hassel v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972), and *Armbruster v. Quinn*, 411 F.3d 1332, 1334 (6th Cir. 1983), the Seventh Circuit in *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 350 (7th Cir. 1983), the Ninth Circuit in *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983), the Tenth Circuit in *Owens v. Rush*, 636 F.2d 283, 285-86 (10th Cir. 1980) and the Eleventh Circuit in *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987).

[8] *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3rd Cir. 1987).

merits as petitioner suggests would create an anomalous situation whereby the employee-numerosity requirements in the ADA and FMLA, based on §701(b), would be jurisdictional while the source law would not be.

Petitioner's next policy argument, that "[i]f the employee-numerosity requirement in section 701(b) itself imposes a limitation on subject matter jurisdiction, that limitation . . . would be applicable to Title VII claims brought in state as well as federal court is simply wrong. Petitioner offers no support for this conclusion and it is well established principle that while state courts are courts of general jurisdiction, federal courts are courts of limited jurisdiction marked out by Congress. *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Petitioner offers no explanation as to how Congressional intent to mark out the limited jurisdiction of federal courts (as respondent suggests Congress has done in §701(b)) demonstrates an intent to proscribe the general jurisdiction of state courts.

Petitioner's first designated policy argument is that litigation of the employee-numerosity requirement frequently turns on complex factual determination, which petitioner suggest should be left to a jury rather than the trial judge. Similarly, petitioner maintains that the numerosity issue will involve "considerable discovery" which should be conducted at the same time as discovery on the merits. An examination of the actual requirements for a numerosity determination actually reveals why this matter is better left in the hands of the trial judge.

Petitioner begins by observing that §701(b) requires a review of employment records for two calendar years. This is clearly true but petitioner offers no explanation as to why it is more desirable to have these records examined by

six to seven lay jurors as opposed to one trial judge. Regardless of whether numerosity is a question of jurisdiction or the merits, any actual dispute that a business employs fifteen or more employees will have to be resolved, starting with someone reviewing the company payroll records. Respondent suggests that one person (a trial judge) can do this far more expeditiously than six to seven individuals sitting on a jury.

Likewise, the analysis required to resolve employee/independent contractor disputes is better suited to a judge than a jury. In this case, the district court considered factors enunciated by the Fifth Circuit to be used for the determination of whether an individual was an employee or independent contractor, citing *Cole v. Venture Transport, Inc.*, 2000 WL 335743 (E.D.La. 2000). In *Cole*, the court articulated the Fifth Circuit's standard:

> The Fifth Circuit has consistently held that the most important factor in this inquiry – although not alone determinative – is whether the "employer" controlled the individual's conduct, that is, "the means and manner of the worker's performance." *Bloom v. Bexar County, Texas*, 130 F.3d 722, 726 (5th Cir. 1997), *internal quotation marks omitted, citing Mares*, 777 F.2d at 1067; *see also Broussard*, 789 F.2d at 1160. The factors pertinent to this inquiry are: (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of job commitment; (7) forms of payment; and (8) directions on schedules and performing work. *See Broussard*, 789 F.2d at 1160.

> Additional relevant factors include: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (4) whether annual leave is afforded; (5) whether the work is an integral part of the business of the "employer"; (6) whether the worker accumulates retirement benefits; (7) whether the "employer" pays social security taxes; and (8) the parties' intention.

Cole, supra. The complexity of these factors lies not in answering the individual questions – the business either pays social security taxes or it does not, the worker either accumulates leave and retirement benefits or he does not. Indeed the district court herein found that many of the factors were undisputed. (App. 32-37). Rather, the complexity lies in balancing the factors which point in differing directions to make the appropriate determination under the "**applicable legal standards**." Arbaugh Br. 27. This is the job for a judge, not a jury.

Curiously, petitioner notes that in *Doe v. Goldstein's Deli*, 82 Fed.Appx. 773 (3rd Cir. 2003), litigation involving employee numerosity resulted in a four day evidentiary hearing with fourteen witnesses. Respondent submits that this example demonstrates the benefit of a judicial, as opposed to jury, determination of the numerosity issue. It is inconceivable that a hearing before a jury would have involved either less witnesses or proceeded more quickly. Under petitioner's merits based view of numerosity, *Doe's* jury would have had to listen to at least four days of

testimony completely unrelated to the main issue of a Title VII action, i.e., whether there was unlawful discrimination.

As to petitioner's contention that the resolution of the numerosity issue will normally involve considerable discovery, petitioner drastically overstates the discovery conducted in this case. While it is true that slightly less than five months passed between the filing of the Motion to Dismiss for Lack of Subject Matter Jurisdiction and the district court's ruling on the motion, petitioner's statement that "five months of discovery, analysis and briefing were required before the district court could reach a decision", Arbaugh Br. 31, is misleading. The district court issued an order on December 26, 2002 allowing petitioner until February 7, 2003 to conduct any discovery on the numerosity issue. Respondent was ordered to respond to this discovery within five working days. (App. 48). Counsel for petitioner took one deposition (App. 25) and requested documents from Y & H. Respondent engaged in no discovery. Furthermore. the court did not order additional discovery as suggested by petitioner, Arbaugh Br. 5, but instead ordered the parties simply to submit additional evidence as to the compensation paid to the owners. (App. 25).

Respondent submits that the limited discovery conducted herein is typical of the discovery necessary to resolve the numerosity issue. The businesses who would invoke the benefits of §701(b) are naturally small businesses. Absent a desire to run a meter on a fee generating case, any Title VII plaintiff attorney should be able to learn everything they need to know about the number of employees of such a business in short order.

Petitioner next asserts that if numerosity is jurisdictional, the trial court is obligated to inquire into the issue to assure its jurisdiction. Apparently, petitioner believes this imposes some great burden on the trial court. In fact, however, there would be no reason for any great burden. If this Court definitively declares numerosity to be a matter of jurisdiction, a trial judge could simply require the defendant company at the initial scheduling conference for the case to affirmatively declare how many employees it had for the relevant years. The district court and the plaintiff would then know at the beginning of the litigation whether jurisdiction under §701(b) needed to be resolved.

Petitioner also asserts that the jurisdictional nature of the numerosity requirement would require the district court to resolve jurisdiction even if the merits were more easily resolved. Although petitioner does not plainly state it, the only merits issues which respondent can foresee which would "more easily" resolve the case would be those leading to the dismissal of a plaintiff's case. That being the case, this potential problem is actually little more than an intellectual exercise. If it were demonstrated to a plaintiff (or more realistically to plaintiff's counsel) that their Title VII action was going to be dismissed on the merits – for example for failing to file an administrative charge within the applicable deadline – one must wonder why that plaintiff would bother to contest an absence of subject matter jurisdiction.

Petitioner further speculates that a Title VII defendant may intentionally defer challenging subject matter jurisdiction under §701(b) in order to gain a tactical advantage. Under petitioner's proposed strategy, a defendant company could get two bites at the apple by trying to win in the federal court on the merits with subject matter

jurisdiction only being raised after trial if it lost. The great flaw in this speculation is that it assumes that only defense attorneys can be Machiavellian. What defense attorney is going to undertake the scheme suggested by petitioner without considering the fact that the law allows the plaintiff to raise lack of subject matter jurisdiction after trial? A defense attorney who puts his small business client through the time and expense of a federal trial, achieves victory at that trial and then has to tell his client that the victory did not mean anything because the court lacked jurisdiction and they will have to try a second case in state court will have only one opportunity to try petitioner's scheme. After that, it is doubtful said attorney will be representing many small businesses in Title VII actions.

Arbaugh also claims that treating numerosity as a jurisdictional requirement would "create additional problems" where a plaintiff files supplemental state law claims along side a Title VII claim. Where the numerosity issue is not raised until after trial, a jurisdictional dismissal would require any verdict on the state law claims be set aside, as well, whereas a merits dismissal would permit the state-law judgment to stand. Arbaugh Br. 37. But this argument assumes that numerosity often will not arise until after trial, a dubious assumption at best. As explained above, small-employer defendants have absolutely no incentive to delay intentionally in filing numerosity-based motions to dismiss; the sooner, the better, as far as such businesses are concerned. And in the wake of a definitive ruling from this Court that numerosity is indeed a jurisdictional defense, inadvertent failures to raise the issue at the outset will be even fewer and farther between than they are now.

Arbaugh also says that even where a case is dismissed on numerosity grounds before trial, the nature of the dismissal could decide the fate of supplemental claims. If jurisdictional, the federal court would have to dismiss the state claims as well and would presumably lose the benefit of any completed discovery. (Again, this argument assumes that the numerosity issue is not raised at the very outset of the proceeding, which it almost certainly would be following a definitive ruling from this Court.) By contrast, Arbaugh says, were the dismissal on the merits, the district court would "retain jurisdiction to resolve the state law claim[s]." Arbaugh Br. 38. But this Court has emphasized that because "[n]eedless decisions of state law should be avoided," *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), "in the usual case in which all federal-law claims are eliminated before trial" – whether on jurisdictional grounds or the merits – "the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims," *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). The point is that, in the real world, the fate of state supplemental claims is not likely to turn on the characterization of the numerosity-based dismissal as jurisdictional or on the merits; in either case, the state-law claims will probably be dismissed.

A jurisdictional approach to the numerosity requirement has functioned for decades in various circuits without creating the disruption which is the subject of petitioner's speculation.[9] A merits-based approach, on the

[9] The Fifth Circuit has held the numerosity requirement is a jurisdictional one for 25 years, *Dumas v. Town of Mount Vernon*, 612

(Continued on following page)

other hand, would significantly undermine the complete immunity which §701(b) is designed to grant to small businesses. *See Hishon*. As Judge Posner speaking for the Seventh Circuit recognized, the purpose of the exemption of small businesses contained in §701(b) is "to spare very small firms from the potentially crushing expense of mastering the intricacies of antidiscrimination laws, establishing the procedure to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries*, 166 F.3d 937, 940 (7th Cir. 1999). Judge Posner's discussion is in complete accord with this Court's analysis of immunity in *Siegert v. Gilley*, 500 U.S. 226, 232-233 (1991), where this Court held:

> One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. In *Mitchell v. Forsyth, supra*, we said:
>
> > *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case

F.2d 974 (5th Cir. 1980), the Sixth Circuit has so held for 33 years, *Hassel v. Harmon Foods, Inc.*, 454 F.2d 199 (6th Cir. 1972), and the Ninth Circuit for 22 years, *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379 (9th Cir. 1983).

> is erroneously permitted to go to trial. 472 U.S 511 at 526, 105 S.Ct. 2806, 86 L.Ed.2d 411.

Given the ease with which questions of fact could be created concerning the number of employees a small business had for the relevant periods, thereby forcing small businesses to trial, a merits-based approach would effectively destroy the immunity which Congress created in §701(b).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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ARGUMENT

I. INTRODUCTION

This case is controlled by the plain language of section 1331 of the Judicial Code and of section 706(f)(3) of Title VII.

The instant lawsuit presents a classic example of section 1331 federal question jurisdiction. The complaint asserts that there has been a violation of federal law (Title VII), and there is a federal cause of action to enforce the prohibitions of Title VII. 42 U.S.C. § 2000e-5(f)(1). Thus this case is a "civil actio[n] arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

Section 1331 is entirely sufficient to establish federal jurisdiction over the instant case unless the jurisdictional grant in section 1331 has been limited by some other provision of federal law. When Congress has wanted to restrict the general grant of federal question jurisdiction in section 1331, it has done so expressly. For example, 42 U.S.C. § 405(h) specifically bars the exercise of jurisdiction under section 1331 over certain claims under the Social Security Act.[1] Some sixty federal statutes more broadly forbid in specified instances the exercise of *any* federal jurisdiction that would otherwise exist under section 1331 or other jurisdictional provisions.[2] See, e.g., 29 U.S.C

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[1] "No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 . . . of title 28 to recover any claim arising under this subchapter."

Another example of a limitation of jurisdiction under section 1331 is to be found in 49 U.S.C. § 10709.

[2] We set forth a list of those statutes in an appendix to this brief.

§ 101 ("No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute. . . . ").[3]

The expressly jurisdictional provision in Title VII, section 706(f)(3), in no way restricts the jurisdictional grant in section 1331. To the contrary, the terms of section 706(f)(3), creating federal jurisdiction over actions "brought under" Title VII, are as broad as those of section 1331, which encompasses actions "arising under" Title VII. As the government explains, section 706(f)(3) was included in Title VII to *broaden* the jurisdiction of federal courts by removing the $10,000 jurisdictional amount requirement that was contained in section 1331 in 1964. (United States Br. 13).

This statutory language is dispositive. Respondent's brief contains no reference to sections 1331 and 706(f)(3) other than a single sentence objecting that reliance on the actual text of these applicable statutes would be unduly "formalistic." (R. Br. 6). In order to prevail, respondent must overcome the clear language of sections 1331 and 706(f)(3) by demonstrating *both* that Title VII repealed by implication part of the general grant of federal question jurisdiction that was already contained in section 1331, *and* that some non-jurisdictional provision in Title VII tacitly overrides the broad and unambiguous grant of

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[3] 29 U.S.C. § 252(d) provides that federal courts may not exercise jurisdiction over wage claims under the Fair Labor Standards Act, the Davis-Bacon Act or Walsh-Healey Act unless the work was done under a contract or pursuant to established local practice. The requirement expressly made jurisdictional by section 252(d) would normally be simply an element of the merits of a wage claim.

jurisdiction in section 706(f)(3). This Court's jurisprudence strongly disfavors repeals by implication and efforts to disregard the plain language of statutory text. Respondent's arguments fall far short of making the extraordinarily compelling showing that would be needed to overcome the express jurisdictional provisions of sections 1331 and 706(f)(3).

II. THE STATUTORY PROVISIONS WHICH LIMIT THE ENTITIES, PLAINTIFFS AND CLAIMS COVERED BY TITLE VII DO NOT RESTRICT THE SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS

Respondent contends that certain elements of a Title VII claim are inherently jurisdictional in nature. According to respondent, those elements include (a) restrictions on which entities are "subject to Title VII" (R. Br. 16), (b) limitations on which potential plaintiffs are "entitled to the protection" of the law (R. Br. 15), and (c) other elements which concern "the very reach" (R. Br. 18) or "the very scope of coverage" (R. Br. 5) of Title VII. The mere inclusion of such coverage limitations in Title VII, respondent suggests, implicitly narrowed the express and broad grant of jurisdiction in section 706(f)(3) and repealed by implication the otherwise applicable grant of jurisdiction in section 1331.

This contention is entirely insufficient to overcome the actual terms of section 706(f)(3) and section 1331. Respondent asks this Court to read section 706(f)(3) as if it restricted federal jurisdiction to "actions brought under this title *against an employer*," "actions brought under this title *by an employee*," or "actions brought under *and within the scope of coverage* of this title." Respondent offers a

variety of arguments as to why these proposed limitations on section 706(f)(3) would further the purposes of Title VII. The conclusive answer to these contentions is a simple one; Congress emphatically did not include any such restrictive language in the actual provisions of section 706(f)(3). The absence of such restrictions in the terms of section 706(f)(3) is all the more telling because Congress has chosen to include limitations of this sort in other statutes. (Pet. Br. 19-22). Its failure to do so here is dispositive.

Federal statutes frequently contain definitions of (and thus limitations on) the persons or entities to which those laws apply. But whether the commands of a statute cover a particular defendant is assuredly a different question than whether a federal court has subject matter jurisdiction to decide the merits of a claim against that defendant. This Court has repeatedly held that federal courts have jurisdiction over actions against defendants which assert, and may ultimately be able to establish, that they are not "subject to" the statute in question.

In *Louie v. United States*, 254 U.S. 548 (1921), the defendant had been indicted for murder under a statute which applied only to individuals who committed crimes on Indian reservations. The defendant asserted that the crime with which he had been charged had not occurred on a reservation, and that he therefore "was with respect to the acts complained of *subject to* the laws of the state of Idaho and not to the laws of the United States." 254 U.S. at 550 (emphasis added); see R. Br. 16 (respondent assertedly not "subject to" Title VII). The court of appeals in *Louie* had held that such a contention concerned the subject matter jurisdiction of the district court, and for

that reason could be reviewed on appeal only by a writ of error to this Court. 254 U.S. at 549. This Court reversed:

> Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court, but went to the merits, there was no basis for a direct writ of error from this court.

254 U.S. at 551.

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the defendant ship owner in a Jones Act case contended, and this Court agreed, that the ship owner was not covered by that statute because the Jones Act "would not *reach* a [ship owner or its agent] performing the proscribed acts aboard the ship of a foreign state on the high seas." 345 U.S. at 578 (emphasis added); see R. Br. 18 (defendant assertedly outside "the very reach" of Title VII). But while holding that the Jones Act did not apply to the defendant, this Court emphatically rejected the defendant's suggestion that the absence of such coverage meant the federal courts had no subject matter jurisdiction over the claim.

> The question of jurisdiction is shortly answered. . . . As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

345 U.S. at 574-75.

If, as respondent suggests, the limitations on the coverage of a statute are now to be read to restrict the broad language of express jurisdictional provisions such as

sections 1331 and 706(f)(3), a very large number of new subject matter jurisdiction issues would be created. Title VII itself, in addition to the fifteen-employee requirement, has ten other restrictions on which entities are "subject to" Title VII,[4] and five limitations on which potential plaintiffs are "entitled to the protection" of that statute.[5] Title VII also contains eight statutory provisions expressly placing certain discriminatory practices outside the prohibitions of the law;[6] any of these might fairly be

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[4] A defendant would not be "subject to" Title VII if it were (1) the United States (42 U.S.C. § 2000e(b)(1)), (2) a corporation wholly owned by the government of the United States (*id.*), (3) an Indian tribe (*id.*), (4) a department or agency of the District of Columbia subject by statute to the procedures of the competitive service (*id.*), (5) a bona fide private membership club (42 U.S.C. § 2000e(b)(2)), (6) not in an industry affecting commerce (42 U.S.C. § 2000e(h)), (7) an employer with respect to the employment of aliens outside any state (42 U.S.C. 2000e-1(a)), (8) a religious organization with respect to the employment of individuals to perform work connected with the carrying on of its activities (*id.*), (9) a foreign person not controlled by an American employer (42 U.S.C. § 2000e-1(c)(2)), or (10) a business or enterprise on or near an Indian reservation with respect to certain publicly announced preferential practices (42 U.S.C. § 2000e-2(i)).

[5] A plaintiff is not subject to the protections of the act if he or she is (1) an independent contractor, rather than an employee or applicant for employment (see 42 U.S.C. § 2000e(f)), (2) a state or local elected official (*id.*), (3) on the personal staff of such an elected official (*id.*), (4) an appointee of such an official at the policy making level (*id.*), or (5) an appointee of such an official with respect to the exercise of constitutional or legal powers (*id.*).

[6] The practices expressly placed outside the coverage of Title VII include: (1) failure to pay for certain abortion related health benefits (42 U.S.C. § 2000e(k)), (2) actions taken outside the United States required by foreign law (42 U.S.C. § 2000e-1(b)), (3) discrimination on the basis of religion, sex or national origin that is a bona fide occupational qualification (42 U.S.C. § 2000e-2(e)(1)), (4) certain employment practices by schools connected with religious organizations or whose curriculum is directed to propagating a particular religion (42 U.S.C. § 2000e-2(e)(2)), (5) refusal to hire or employ individuals who fail to

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characterized as constituting limitations on "the very reach" of the law. On respondent's view, all of these provisions would restrict the subject matter jurisdiction of the federal courts. Rule 8(a)(1) would presumably require every Title VII plaintiff to allege, not merely that his or her claim arose under Title VII, but also that all of these other restrictions had been satisfied. If these statutory provisions were held to limit subject matter jurisdiction, any factual disputes bearing on their application would have to be resolved by the court rather than a jury.

If coverage restrictions were generally deemed to limit subject matter jurisdiction, a very large number of other statutes would be affected in addition to Title VII. Such a view of subject matter jurisdiction would have a substantial impact, for example, on the enforcement of the Americans With Disabilities Act. The ADA only covers discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The statute spells out the definition of "disability" (42 U.S.C. § 12102(2)) and "qualified individual" (42 U.S.C. § 12111(8)). Disputes about whether a plaintiff had a disability, or was qualified, are often at the very heart of ADA cases, and raise complex factual disputes and fact-bound issues. The ADA expressly incorporates by reference the broad jurisdictional provision of section 706(f)(3) of Title VII. 42 U.S.C. § 12117(a). But if, despite the terms of section 706(f)(3), ADA coverage issues are now deemed to limit subject matter jurisdiction,

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satisfy certain requirements imposed in the interest of national security (42 U.S.C. § 2000e-2(g)), (6) the utilization of a bona fide seniority system (42 U.S.C. § 2000e-2(h)), (7) the utilization of certain validated tests (*id.*), and (8) practices authorized by certain provisions of the Fair Labor Standards Act (*id.*).

a substantial portion of all ADA cases would be transformed into disputes about subject matter jurisdiction.

III. THE DECISIONS OF THIS COURT DO NOT HOLD THAT THE TITLE VII EMPLOYEE-NUMEROSITY REQUIREMENT IS JURISDICTIONAL

Respondent insists that on repeated occasions this Court, implicitly rejecting a literal reading of sections 1331 and 706(f)(3), has agreed that the employee-numerosity requirement limits the subject matter jurisdiction of the federal courts. The previous decisions of this Court, respondent contends, have already "demonstrated a recognition by this Court that Congress did not intend for the federal courts to have jurisdiction over the small businesses." (R. Br. 5). "[T]his Court consistently has addressed § 701(b) in jurisdictional terms." (R. Br. 7).

This Court, however, has emphatically cautioned that no conclusion regarding subject matter jurisdiction can be drawn from decisions of this Court in which the existence vel non of subject matter jurisdiction was not the specific issue before the Court, even though this Court itself there characterized some provision before it as "jurisdictional." In a number of past decisions

> the jurisdictional character of [an issue] made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect.

Steel Co. v. Citizens for A Better Environment, 523 U.S. 83, 91 (1998). Moreover, courts, litigants and federal agencies at times have used the term "jurisdiction" to refer to things other than subject matter jurisdiction. "'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'" *Id.* at 90 (*quoting United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C.Cir. 1996)). This Court has admonished that

> [c]larity would be facilitated if courts and litigants used the label 'jurisdictional' . . . only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 455 (2004). But "[c]ourts, including this Court, it is true, have been less than meticulous in this regard." *Id.* at 454.

This Court has repeatedly applied this admonition, declining to attribute significance to the use of the term "jurisdiction" (or "jurisdictional") in prior decisions where the existence of subject matter jurisdiction was not squarely disputed. E.g., *Steel Co. v. Citizens for A Better Environment*, 523 U.S. at 91-92 (rejecting reliance on reference to "federal jurisdiction" in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52 (1987)). Most recently in *Eberhart v. United States*, 126 S.Ct. 403 (2005), this Court unanimously held that the deadline established by Federal Rule of Criminal Procedure 33(a) does not limit the subject matter jurisdiction of the district courts, despite the fact that this Court in five previous decisions had described that very time limitation as "jurisdictional." 126 S.Ct. at 406. Those earlier decisions, this Court explained, had used the adjective "jurisdictional"

only to explain that the limitation in Rule 33(a) was "emphatic." *Id.* "Those cases . . . do not hold the limits of the Rules to be jurisdictional in the proper [subject matter jurisdiction] sense that *Kontrick* describes." 126 S.Ct. at 405.

Steel Co., *Kontrick*, and *Eberhart* are fatal to respondent's effort to rely on past decisions of this Court to establish that the employee-numerosity requirement limits the subject matter jurisdiction of the federal courts. This Court's decision in *EEOC v. Arabian American Oil Co.* (*Aramco*), 499 U.S. 244 (1991), is a quintessential example of the many meanings of "jurisdiction." The majority opinion in *Aramco* at various points uses the term "jurisdiction" with four quite different meanings: (1) the acts within the coverage of a statute (e.g., "Congress knows how to place the high seas within the jurisdictional reach of a statute,"[7] 499 U.S. at 258 (*quoting Argentine Republic v. Amaerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)),[8] (2) conduct which Congress has the

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[7] In a footnote to this statement, the Court in *Argentine Republic* cited two examples of legislation that placed action on the high seas "within the jurisdictional reach of a statute": 14 U.S.C. § 89(a) (empowering the Coast Guard to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction") and 19 U.S.C. § 1701 (permitting the President to declare portions of the high seas as customs enforcement areas.) 488 U.S. at 440 n.7. Neither of these provisions had anything to do with subject matter jurisdiction.

[8] This is the most frequent sense with which the term jurisdiction is utilized in *Aramco*. See 499 U.S. at 248, 249, 251, 252, 258.

The EEOC relied on the decision in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), in which this Court had held that the Lanham Act applied to actions outside the United States because of the "broad jurisdictional grant in the Lanham Act." 344 U.S. at 286. In *Steele* "jurisdiction" was used to denote the scope of activities covered by the

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constitutional authority to regulate (e.g., "the legislative basis for jurisdiction," 488 U.S. at 253), (3) the geographical areas in which the United States is sovereign, and in which the application of federal law would thus not be extraterritorial (e.g., 488 U.S. at 248 "the territorial jurisdiction of the United States" (*quoting Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)), and (4) the subject matter jurisdiction of the federal courts (e.g., "Respondent filed a motion for summary judgment on the ground that the District Court lacked subject-matter jurisdiction," 488 U.S. at 247.)).

The EEOC and the Court in *Aramco* used "jurisdiction" in the first sense when they characterized the Title VII definition of employer as "jurisdictional." The question presented in *Aramco* concerned not subject matter jurisdiction but coverage, whether "Congress has in fact exercised" its "authority to enforce its laws beyond the territorial boundaries of the United States." 499 U.S. at 248. The scope of the definition of employer was only relevant to the issue in *Aramco* insofar as that definition delineated the employers to whom the prohibitions of Title VII applied. Referring to that definition and others, the government argued that "[t]he statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States." 499 U.S. at 253. Only provisions that are jurisdictional in the sense of coverage, not provisions regarding the subject matter jurisdiction of the courts, can "confer coverage" on groups of employees. (Provisions regarding subject matter jurisdiction confer subject matter jurisdiction, not coverage, and do so on federal courts, not on employees.)

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statute; this Court concluded that "the petitioner's activities . . . fall within the jurisdictional scope of the Lanham Act." 344 U.S. at 285.

This was clearly the meaning of jurisdiction as that term was used during the oral argument in *Aramco*.[9]

Respondent relies on a footnote in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which observed that in some circumstances

> Stat[e] . . . laws are more protective that Title VII. For example, Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees. . . .

486 U.S. at 120 n.5. This passage involves yet a fifth usage of the term jurisdiction. An agency has jurisdiction over a claim or defendant if the underlying dispute and parties are within the coverage of the statute the agency administers and the matter has been brought (and remains) before the agency in the proper manner. EEOC jurisdiction under section 706(b) of Title VII is thus distinct from the subject matter jurisdiction of a federal court under section 706(f)(3). With regard to the agency's jurisdiction, Title VII has no provision comparable to section 706(f)(3) conferring jurisdiction on the EEOC over any charge "brought under"

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[9] For example, one member of this Court noted that "when Congress means to *apply* laws of the United States abroad, it must be clear about it . . . we will accept strained readings . . . in order to defeat extraterritorial *jurisdiction*, unless Congress has been clear about it." 1991 WL 636297 at *7 (emphasis added). Another member of this Court contrasted "a statute that confers *jurisdiction* over all companies involved in interstate or foreign commerce" with a statute "*applying* only to United States companies involved in interstate or foreign commerce on the shores of this country." *Id.* (emphasis added).

The Solicitor General referred to the Title VII definitions of employer and coverage both as a "broad grant of coverage," 1991 WL 636297 at *5, and as giving the statute "broad jurisdictional reach." 1991 WL 636297 at *43.

Title VII. The prevailing usage of the concept of agency jurisdiction was long reflected in the EEOC's Compliance Manual. For example, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court held that the failure of a plaintiff to file a timely charge with EEOC does not limit the subject matter jurisdiction of a federal court. Yet a year after *Zipes*, the EEOC issued a section of its Compliance Manual stating that the lack of such a timely charge deprived the Commission itself of jurisdiction. EEOC Compliance Manual § 605.5 (2000) ("In order for the Commission to have jurisdiction over a charge, the charge must be filed within a certain period after the date that the alleged discriminatory act occurred.")[10]

The absence of agency jurisdiction over a controversy cannot ipso facto mean that the federal courts themselves would have not subject matter jurisdiction over the same matter. If the absence of agency jurisdiction were synonymous with the absence of subject matter jurisdiction, then there would be no way in which an aggrieved party could obtain judicial relief from an adverse agency action on the ground that that agency lacked jurisdiction. Section 709(c), for example, authorizes an employer to seek judicial relief from certain orders by the EEOC. 42 U.S.C. § 2000e-8(c). But if agency and subject matter jurisdiction were the same, then whenever an employer opposed an EEOC order on the ground that the Commission had no jurisdiction to issue the order because that employer had less than fifteen employees, it would follow that the federal court from which relief was sought would itself lack jurisdiction to consider that claim. Because agency

[10] This portion of the Compliance Manual was promulgated in October 1983.

jurisdiction and subject matter jurisdiction are indeed distinct, federal courts routinely entertain claims that agency action exceeded the agency's own jurisdiction. E.g. *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *McCulloch v. Socieded Nacional de Marineros de Honduras*, 372 U.S. 10, 16 (finding district court had jurisdiction over the action attacking an order of the NLRB), 22 (concluding that the board was without jurisdiction to issue the order in question) (1963).

Finally, respondent insists that this Court's decision in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1998), regarding the employee-numerosity requirement, demonstrates "that this Court viewed the issue as one of subject matter jurisdiction." (R. Br. 10). Respondent imputes this holding to *Walters* because the Court, having determined the correct method for calculating whether an employer had fifteen employees, proceeded to apply that methodology to the record in *Walters* and held that the requisite fifteen employees were present. If the employee-numerosity requirement were an element of the plaintiff's claim, respondent argues, this Court would have remanded that issue for a jury trial. As the government points out, however, there were no disputes of historical fact regarding how many employees were on the defendant's payroll during the time period in question (U.S.Br. 27);[11]

[11] The record in *Walters* consisted largely of stipulations and joint exhibits. Brief for the EEOC, *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, at 5-6; Brief for Respondent, *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, at 7.

there were thus no factual issues for a jury or a court to resolve.[12]

Several amici argue that the EEOC itself has in the past referred to the employee-numerosity requirement as jurisdictional.[13] But the documents to which they refer merely demonstrate that the EEOC, like this Court, has used the term "jurisdictional" with several different meanings. In some cited instances, for example, the EEOC characterized the fifteen-employee requirements as "a jurisdictional prerequisite to Title VII *coverage*,"[14] the meaning with which this Court in *Aramco* used the term jurisdictional to refer to that requirement. In other instances the EEOC has noted that the fifteen-employee requirement is relevant to whether "the Commission lacks jurisdiction,"[15] the same reference to agency jurisdiction found in this Court's decision in *Commercial Office Products*.

One amicus notes that the pre-2000 version of EEOC's Compliance Manual "devoted an entire section to the subject of 'Title VII Jurisdiction'"[16] including a subsection regarding the fifteen-employee requirement. But that

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[12] If there had been such factual disputes, and the employee-numerosity requirement was a limit on subject matter jurisdiction, this Court would not itself have resolved those disputes, but would instead have remanded those issues for an evidentiary hearing before the district judge.

[13] Brief of the States of Alabama, et al., pp. 20, 22, 23-25; Brief Amicus Curiae for the Chamber of Commerce, et al., p. 15.

[14] Policy Guidance: Whether Part-Time Employees are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA, 1990 WL 1104704 at *1 (1990) (emphasis added).

[15] Brief for Petitioner at 26-27, *EEOC v. Commercial Office Products Co.*, 488 U.S. 107 (No. 86-1696).

[16] Br. of the States of Alabama, et al., at 22.

section concerns, not the subject matter jurisdiction of the courts, but "the range and extent of the Commission's authority to accept, investigate, and resolve charges of employment discrimination,"[17] i.e., agency jurisdiction. The section in question, approximately one hundred pages in length, encompasses a wide range of considerations that neither respondent nor any amicus contends limit the subject matter jurisdiction of the federal courts, such as the timeliness of Title VII charges,[18] the types of discrimination forbidden by Title VII,[19] whether particular discriminatory practices are exempted from the provisions of Title VII,[20] successor liability,[21] charges filed by minors,[22] the res judicata effect of state administrative determinations,[23] the immunity from suit of certain international organizations under international law and United States domestic law,[24] and whether employers can bring a charge against labor organizations.[25] In the spring of 2000 the EEOC largely rewrote this section, now characterizing its contents as "Threshold Issues" rather than jurisdiction.[26] This is not, as one amicus would have it, a "new found

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[17] EEOC Compliance Manual § 605.1 (2000).

[18] *Id.* §§ 605.5-605.7.

[19] *Id.* §§ 605.2, 605.17(a).

[20] E.g., Policy Guidance: Religious Organizations That Pay Women Less Than Men in Accordance with Religious Beliefs (included in section 605.16 after page 605-38).

[21] *Id.* § 605.17(b).

[22] *Id.* § 605.17(e).

[23] *Id.* § 605.17(f) and Appendices 605-J and 605-K.

[24] *Id.* Appendix 605-B.

[25] *Id.* Appendix 605-L.

[26] EEOC Compliance Manual § 2 (2005).

position"[27] regarding the subject matter of the federal courts, an issue that was never within the scope of the earlier version of the Compliance Manual. Rather, the EEOC has laudably taken the very action urged by this Court in *Steel Company*, now using the term jurisdiction in a more circumspect manner.

IV. NO COMPELLING CIRCUMSTANCES WARRANT DISREGARDING THE PLAIN TEXT OF SECTIONS 1331 AND 706(f)(3)

If the employee-numerosity requirement is not treated as limiting the subject matter of the courts, respondent and several amici argue, small employers will invariably and unfairly be forced to bear the expense of full discovery and trial on the merits. Even if the problem posited by this argument actually existed, it would be insufficient to overcome the plain language of sections 1331 and 706(f)(3).

That problem, moreover, is chimerical. In many instances where a dispute arises regarding whether an employer had the requisite fifteen employees, the underlying facts (although initially controverted) will often be established by relevant business and tax records.[28] Rule 56 of the Federal Rules of Civil Procedure provides an expeditious manner of resolving many such disputes: summary judgment. Neither respondent nor any amici offer any reason why summary judgment would be inapplicable to

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[27] Brief of the States of Alabama, et al. at 25.

[28] Brief Amicus Curiae of the Chamber of Commerce, et al., at 20; Brief of the International Municipal Lawyers Association, p. 10; Brief of the States of Alabama, et al., at 2.

controversies regarding whether an employer had fifteen employees during the relevant period of time. Of course, regardless of whether a defendant moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), or moves for summary judgment under Rule 56, some discovery will usually be necessary to unearth and verify the relevant documents. But once those materials are in the record, summary judgment for the defendant, or partial summary judgment for the plaintiff, will often be appropriate.[29]

In actual practice today, most employer motions regarding the employee-numerosity requirement already are either filed as summary judgment motions, or treated by the district courts as a request for summary judgment. Summary judgment has proved an expeditious procedure for resolving these issues; in most cases in which summary judgment is awarded to employers with fewer than fifteen employees, that motion is granted within about a year of the commencement of the action. Dismissals under Rule 12(b)(1) do not appear to occur with any greater speed. In about a third of all such cases the motion is denied, or deferred, because of the need for discovery, a consideration equally applicable to motions under Rule 12(b)(1) and those under Rule 56. We set forth in an appendix to this brief a summary of district court decisions since January 1, 2005, involving such motions.

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[29] An evidentiary hearing would be necessary, for example, if there were a dispute as to the accuracy or completeness of business records. That might occur if a plaintiff alleged that several workers were employed off the books. In addition, the factors relevant to whether an individual was an independent contractor, rather than an employee, would often involve facts (such as the degree of day-to-day supervision) not reflected in business records. See Pet. Br. 30 n.48.

Small employers which may be outside the coverage of Title VII will often have good reason to pursue that issue at the outset of a lawsuit through a motion for summary judgment. Other facets of the case may be more expensive and time consuming to resolve. As several amici properly note, the question of whether an employer acted with a discriminatory motive is often unsuited to resolution by summary judgment. "A Title VII merits case generally involves . . . multiple credibility determinations."[30] Determination of whether an employer had such an unlawful purpose "is almost always based on circumstantial evidence, requiring inferential arguments and substantial discovery."[31] Summary judgment on the elusive issue of intent may be difficult to obtain once a plaintiff has established a prima facie case.[32] See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Rule 56 permits an employer to seek resolution of a case on the ground that it lacks the requisite fifteen employees without awaiting trial on the other issues in the case.

The snippets of legislative history invoked by respondent and several amici are entirely insufficient to overcome the plain language of sections 1331 and 706(f)(3). The fact that Congress intended to exempt certain small business from coverage by Title VII in no way supports the very different assertion that Congress intended that coverage restriction to operate as well as a limitation on subject matter jurisdiction. Certainly no member of Congress said any such thing when Title VII was first enacted in 1964. Language in 1972 committee reports

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[30] Brief Amici Curiae for the Chamber of Commerce, et al., at 20 n.8.

[31] Brief of the International Municipal Lawyers Association, at 20.

[32] *Id.* at 21.

cannot alter the meaning of a statute that was enacted eight years earlier. A careful reading of the reports in question, moreover, makes clear that Congress was using the term "jurisdiction" to refer (as in *Aramco*) to the coverage of Title VII[33] or (as in *Commercial Office Products*) to the types of cases which the EEOC was authorized to investigate and conciliate.[34]

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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[33] H.R.Rep. 92-238 at 1 (amendments would "broaden jurisdictional coverage"), 20 ("changing the jurisdictional reach of Title VII").

[34] H.R.Rep. 92-238 at 64 (EEOC jurisdiction expanded), 70 (bill "expands the jurisdiction of the EEOC").

District Court Decisions
Regarding Title VII
Employee-Numerosity Requirement
January 1, 2005 to November 21, 2005

Burkhard v. Henry Soil and Water Conservation Dist., 2005 WL 1863828 (N.D.Ohio)

Suit commenced: 2002
Date of decision: August 3, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because evidence established employer had more than fifteen employees

Christaldi-Smith v. JDJ, Inc., 367 F.Supp. 2d 756 (E.D.Pa. 2005)

Suit commenced: September 20, 2004
Date of decision: April 26, 2005
Basis of motion and decision: motion to dismiss under F.R.Civ.P. 12(b)(6); treated as a motion for summary judgment
Disposition: motion denied because of need for discovery

De Jesus v. LLT Card Services, Inc., 2005 WL 1881482 (D.P.R.)

Suit commenced: December 14, 2004
Date of decision: August 9, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because of need for discovery

Doughty v. Regional Aids Interfaith Network, 2005 WL 1862014 (W.D.Mo.)

Suit commenced: August 18, 2004
Date of decision: August 4, 2005
Basis of motion and decision: motion for summary judgment or to dismiss; resolved as a motion to dismiss

Disposition: motion granted (motion earlier denied on April 20, 2005, pending further discovery)

Flowers v. Memphis Sleep Labs, Inc., 2005 WL 1719768 (W.D.Tenn.)

Suit commenced: October 28, 2004
Date of decision: July 21, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Harper v. PCA Security, 2005 WL 2291226 (W.D.Tenn.)

Date filed: November 14, 2003
Date of decision: September 20, 2005
Basis of motion and decision: court raised question regarding existence of subject matter jurisdiction;
Disposition: case dismissed for want of jurisdiction and for lack of prosecution after pro se plaintiff failed to pursue discovery

Harris v. Community Resources Council of Shawnee County, 2005 WL 3050149 (D.Kan.)

Suit commenced: November 11, 2004
Date of decision: November 15, 2005
Basis of motion and decision: motion for partial summary judgment
Disposition: motion granted

Hiltebrand v. Lynn's Hallmark Card Shop, 2005 WL 2387611 (M.D.Ga.)

Suit commenced: December 18, 2003
Date of decision: September 28, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because of unresolved disputes of fact

Jackson v. NEXT Financial Group, Inc., 2005 WL 1630532 (D.Minn.)

Suit commenced: October 29, 2004
Date of decision: July 11, 2005

Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Matthews v. American Psychological Society, 2005 WL 555413 (D.D.C.)
Suit commenced: February 17, 2004
Date of decision: March 7, 2005
Basis of motion and decision: motion to dismiss for lack of subject matter jurisdiction, to dismiss under F.R.Civ.P. 12(b)(6), or for summary judgment
Disposition: motions to dismiss for lack of subject matter jurisdiction and to dismiss under Rule 12(b)(6) denied; motion for summary judgment denied because of unresolved disputes of fact

Pavel v. Plymouth Management Group, 2005 WL 2659089 (E.D.N.Y.)
Suit commenced: November 18, 2002
Date of decision: October 18, 2005
Basis of motion and decision: motion for summary judgment or to dismiss for want of subject matter jurisdiction; treated as a motion for summary judgment
Disposition: motion granted

Persaud v. Ash & Peterkin Cent. Lock, 2005 WL 100711 (S.D.N.Y.)
Suit commenced: June 17, 2004
Date of decision: January 19, 2005
Basis of motion and decision: motion to dismiss; treated as a motion for summary judgment
Disposition: motion granted

Scott v. City of Minco, 393 F. Supp. 2d 1180 (W.D.Okl.)
Suit commenced: 2004 (answer filed on August 19, 2004)
Date of decision: May 25, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Smith v. Castaways Family Diner, 2005 WL 1431894 (N.D.Ind.)

Suit commenced: July 30, 2004
Date of decision: June 16, 2005
Basis of motion and decision: motion for partial summary judgment
Disposition: motion granted

Stone v. Indiana Postal and Federal Employees Credit Union, 2005 WL 2347226 (N.D.Ind.)

Suit commenced: March 21, 2004
Date of decision: January 26, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Tawes v. Frankford Volunteer Fire Co., 2005 WL 83784 (D.Del.)

Suit commenced: August 28, 2003
Date of decision: January 13, 2005
Basis of motion and decision: motion to dismiss; treated as motion for summary judgment
Disposition: motion granted

Thomason v. Maui Tacos/Tiki Takez LLC, 2005 WL 2002079 (M.D.Ala. 2005)

Suit commenced: February 23, 2005
Date of decision: August 17, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because of need for discovery

Walls v. Avpro, Inc., 2005 WL 855931 (D.Md.)

Suit commenced: September 23, 2004
Date of decision: April 14, 2005
Basis of motion and decision: motion to dismiss; treated as a motion for summary judgment
Disposition: motion granted

Express Limitations on the Jurisdiction of Federal Courts

2 U.S.C. § 501(g)

2 U.S.C. § 502(c)

7 U.S.C. § 1367

8 U.S.C. § 1158(c)

8 U.S.C. § 1182(a)(9)(B)(iii)(v)

8 U.S.C. § 1182(h)

8 U.S.C. § 1182(i)(2)

8 U.S.C. § 1187(c)(1)(6)

8 U.S.C. § 1187(g)

8 U.S.C. § 1126a(b)(1)

8 U.S.C. § 1227(a)(3)(C)(ii)

8 U.S.C. § 1229c(f)

8 U.S.C. § 1252(a)(2)(A)

8 U.S.C. § 122(a)(2)(B)

8 U.S.C. § 1252(a)(2)(C)

8 U.S.C. § 1252(b)(9)

8 U.S.C. § 1252(g)

8 U.S.C. § 1255a(f)(4)(C)

12 U.S.C. § 1467a(f)(5)(B)

12 U.S.C. § 1786(k)(1)

12 U.S.C. § 1787(b)(13)

12 U.S.C. § 1818(i)(1)

12 U.S.C. § 1821(d)(13)(D)

12 U.S.C. § 1844(e)(2)

12 U.S.C. § 2267

12 U.S.C. § 4208

12 U.S.C. § 4228

12 U.S.C. § 4242

12 U.S.C. § 4584(b)

12 U.S.C. § 4623(d)

12 U.S.C. § 4635(b)

15 U.S.C. § 717z(g)(1)

15 U.S.C. § 719h(c)

15 U.S.C. § 2703(f)(3)

15 U.S.C. § 3207(a)(1)

15 U.S.C. § 3416(c)

15 U.S.C. § 3803(d)(3)

15 U.S.C. § 6712(b)(2)

16 U.S.C. § 824k(f)(3)

16 U.S.C. § 2633(c)

16 U.S.C. § 3168

19 U.S.C. § 1516a(g)(2)(B)

19 U.S.C. § 1516a(g)(5)(C)(iv)

19 U.S.C. § 1516a(g)(7)(A)

19 U.S.C. § 1516a(g)(7)(B)

19 U.S.C. § 1677f(f)(1)(C)

22 U.S.C. § 6450

25 U.S.C. § 1775h(b)

26 U.S.C. § 6305(b)

26 U.S.C. § 6402(f)

29 U.S.C. § 101

29 U.S.C. § 104

29 U.S.C. § 105

29 U.S.C. § 107

29 U.S.C. § 252(d)

31 U.S.C. § 3730(e)(1)

31 U.S.C. § 3730(e)(2)(A)

31 U.S.C. § 3730(e)(4)(A)

42 U.S.C. § 239a(f)(2)

42 U.S.C. § 1973l(b)

42 U.S.C. § 2160a

42 U.S.C. § 2184

42 U.S.C. § 9622(e)(3)(C)

43 U.S.C. § 2011(c)

50 U.S.C. § 47d(b)

(5)

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In the Supreme Court of the United States

JENIFER ARBAUGH, PETITIONER

v.

Y & H CORPORATION, D/B/A THE MOONLIGHT CAFE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination by an "employer," and defines an "employer" for that purpose to be a person who, *inter alia*, had 15 or more employees for each working day during 20 or more weeks in the current or preceding year. The question is whether the 15-employee requirement limits the courts' subject matter jurisdiction, or instead is relevant only to the merits of a Title VII claim.

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In the Supreme Court of the United States

No. 04-944

JENIFER ARBAUGH, PETITIONER

v.

Y & H CORPORATION, D/B/A/ THE MOONLIGHT CAFE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether Congress's exclusion of persons with fewer than 15 employees from the definition of the term "employer" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, limits the courts' subject matter jurisdiction, or instead relates only to the merits of claims brought under Title VII. The Equal Employment Opportunity Commission (Commission or EEOC) administers Title VII and brings civil actions against private employers to enforce its requirements. 42 U.S.C. 2000e-5(f)(1). The Attorney General has authority to bring such actions against public employers. *Ibid.* In addition to bringing actions under Title VII, the United States is also subject to suit under that statute. 42 U.S.C. 2000e-16(c). The Department of

Labor, the EEOC, and the Attorney General administer and enforce a number of other statutes, including the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, that contain similar provisions restricting the definition of affected "employer[s]" to those with a minimum number of employees. 42 U.S.C. 12111(5)(A), 12117(a); 29 U.S.C. 626(b), 630(b); 29 U.S.C. 2611(4)(A), 2617(b) and (d). The United States therefore has a substantial interest in this case.

STATEMENT

1. Under Title VII, it is generally an "unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Title VII also prohibits other specified "unlawful employment practice[s]" by an "employer" or other covered entity, including an "employment agency" or "labor organization." 42 U.S.C. 2000e-2(a), (b) and (c); 42 U.S.C. 2000e-3. For purposes of Title VII:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any depart-

> ment or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26. * * *

42 U.S.C. 2000e(b).

Any person claiming to be aggrieved by an unlawful employment practice may file a charge with the EEOC. 42 U.S.C. 2000e-5(b). If the Commission determines that there is reasonable cause to believe that an employer or other covered entity engaged in such a practice, it shall "endeavor to eliminate * * * [the] practice by informal methods of conference, conciliation, and persuasion." *Ibid.* If such informal methods do not succeed, the Commission may bring a civil action against the respondent, unless the respondent is a government, governmental agency, or political subdivision, in which case the Attorney General may bring such an action. 42 U.S.C. 2000e-5(f)(1). If neither the Commission nor the Attorney General brings a civil action, the aggrieved person or persons may do so. *Ibid.*

Congress granted the federal courts jurisdiction over all such actions: "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. 2000e-5(f)(3).

2. In November 2001, petitioner Jenifer Arbaugh brought this lawsuit against respondent Y&H Corporation, d/b/a The Moonlight Cafe, in the United States District Court for the Eastern District of Louisiana. Pet. App. 1-2. Petitioner alleged that she had been subjected to sexual harassment and constructively discharged

from her employment as a waitress and bartender at the Moonlight Cafe, in violation of Title VII and Louisiana state law. *Id.* at 2. Respondent "admitted [petitioner's] allegations as to jurisdiction but denied her allegations on the merits." *Id.* at 46.

After the parties completed discovery, the district court held a trial on the merits of petitioner's claims. See Pet. App. 3. A jury returned a verdict in favor of petitioner and awarded her $5000 in back pay, $5000 in compensatory damages, and $30,000 in punitive damages. *Ibid.* The district court entered judgment for petitioner based on the jury verdict. *Ibid.*

3. Two weeks later, respondent moved to dismiss the action for lack of subject matter jurisdiction. Pet. App. 3. Respondent argued in that post-verdict motion, for the first time, that it did not have 15 employees when it employed petitioner, and therefore was not an "employer" under 42 U.S.C. 2000e(b). Pet. App. 3.

The district court directed another round of discovery and briefing. Pet. App. 45-49. The court emphasized that it is "unfair and a waste of judicial resources to permit the [respondent] to admit [petitioner's] allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." *Id.* at 47. "Unfortunately," the court concluded, "none of these considerations are sufficient to confer subject matter jurisdiction [where] it is lacking." *Ibid.*

After the parties completed additional discovery and briefing, the district court requested further evidence regarding the compensation received by two of respondent's alleged owners. Pet. App. 25. The court ultimately concluded that it lacked subject matter jurisdiction because respondent's delivery drivers and owners

were not "employees" for purposes of Title VII, and when those persons are excluded from consideration, respondent had fewer than 15 employees during the relevant time period. *Id.* at 32-43. The court therefore dismissed petitioner's Title VII claim with prejudice, and her state-law claims without prejudice. *Id.* at 23.

4. The court of appeals affirmed. Pet. App. 1-22. The court determined that it was bound by Fifth Circuit precedents holding that a defendant's "failure to qualify as an 'employer' under Title VII deprives a district court of jurisdiction." *Id.* at 7 (citing, *e.g.*, *Dumas* v. *Town of Mt. Vernon*, 612 F.2d 974, 980 (1980)); see *id.* at 8-9.

After noting that "whether an individual is an 'employee' for Title VII purposes is a fact-intensive inquiry, and as with most employee-status cases, there are facts pointing in both directions" (Pet. App. 17), the court of appeals agreed with the district court that the delivery drivers and owners were not employees. *Id.* at 17-18, 20-21. Moreover, "[b]ecause it is undisputed that [respondent] did not employ the requisite 15 employees without the inclusion of" those persons, the court concluded that respondent is "not subject to liability under Title VII, and thus the district court properly dismissed [petitioner's] suit for lack of subject matter jurisdiction." *Id.* at 22.

SUMMARY OF ARGUMENT

A. The court of appeals erred by conflating the distinct questions whether a claim is meritorious and whether the courts have subject matter jurisdiction to adjudicate the claim. "It is firmly established * * * that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter juris-

diction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Instead, "where the complaint, as here, is drawn so as to seek recovery directly under the Constitution or laws of the United States, [a] federal court * * * must entertain the suit" unless the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell* v. *Hood*, 327 U.S. 678, 681-682, 682-683 (1946). Petitioner's Title VII claim is by no means immaterial or frivolous.

B. Although Congress may limit the courts' subject matter jurisdiction based on facts that are also relevant to the merits of a case, nothing in Title VII evinces an intent to do so. To the contrary, Title VII expressly provides that "[e]ach United States district court * * * shall have jurisdiction of actions brought under [Title VII]." 42 U.S.C. 2000e-5(f)(3). That jurisdictional provision does not turn in any way on whether the defendant employs 15 or more employees. Instead, the 15-employee requirement is found in Title VII's definition of the term "employer," a term that is used in the provisions of Title VII that establish the *substantive rights and obligations* of the parties, but not in Title VII's *jurisdictional* provision.

That makes this case closely analogous to *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982), which held Title VII's timely-filing requirement to be non-jurisdictional, in large part because Title VII's jurisdictional provision "contains no reference" to the timely-filing requirement, and the separate provision containing that requirement "does not * * * refer in any way to the jurisdiction of the district courts." Here, too, the definition of "employer" is structurally separate

from the jurisdictional provision, which makes no reference to that definition.

The non-jurisdictional character of the 15-employee requirement reflects not only the best reading of the statute, but common sense as well. Determining whether a defendant had 15 workers who qualified as "employees" for purposes of Title VII during the relevant time period can require extensive discovery and factual analysis. As such, it would make little sense to treat the issue as jurisdictional, with the consequence that appellate courts would have to identify and resolve the complex factual issue *sua sponte*, and district courts would have to resolve the issue at the threshold of a case, instead of considering it in connection with other merits issues. Moreover, if the 15-employee requirement were jurisdictional, the relevant time period for measuring the defendant's workforce would be the time when the case was filed, as opposed to the time when the allegedly unlawful conduct occurred. It would make little sense, however, to permit employers to shed liability for past unlawful discrimination by firing employees, and thereby reducing their workforce below the 15-employee level.

C. The courts of appeals that have held the 15-employee requirement to be jurisdictional have provided little reasoning supporting that result. Some courts have suggested that the issue is jurisdictional because it relates to whether Title VII applies in a particular case, or to a particular defendant. As this Court has explained, however, "whether Congress intended to allow a certain cause of action against [a particular defendant]" is "not a question of jurisdiction." *Air Courier Conf. of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Instead, it is a merits inquiry.

Although respondent has argued that this Court already determined that the 15-employee limitation is jurisdictional, this Court has never squarely faced that question, much less decided it. As this Court recently observed, jurisdiction is a term of many meanings and is often used imprecisely. See *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). "[S]cattered references to [a] requirement as jurisdictional" lack precedential effect where, as here, "the legal character of the requirement was not at issue in those cases." *Zipes*, 455 U.S. at 395.

ARGUMENT

THE 15-EMPLOYEE REQUIREMENT IS RELEVANT TO WHETHER A PLAINTIFF CAN STATE A VALID CLAIM, BUT NOT TO THE COURTS' JURISDICTION TO ADJUDICATE THE CLAIM

A. Whether A Plaintiff Can State A Valid Claim Is Ordinarily Relevant Only To The Merits Of The Case, Not To The Courts' Jurisdiction Over The Subject Matter

1. "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951). While "*jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case * * * *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979); see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the par-

ties") (internal quotation marks omitted); *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) ("subject matter jurisdiction" refers only to a court's "power to hear a case").

The court of appeals erroneously conflated those inquiries by concluding that respondent "is not subject to liability under Title VII and *thus* the district court properly dismissed [petitioner's] suit for lack of subject matter jurisdiction." Pet. App. 22 (emphasis added). "It is firmly established * * * that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); accord *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002); *Duke Power Co.* v. *Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 70-71 (1978); *Baker* v. *Carr*, 369 U.S. 186, 199-200 (1962); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571, 574-575 (1953); *Montana-Dakota Utils.*, 341 U.S. at 249; *Bell* v. *Hood*, 327 U.S. 678, 685 (1946); *Binderup* v. *Pathe Exch., Inc.*, 263 U.S. 291, 305-306 (1923); *Swafford* v. *Templeton*, 185 U.S. 487, 493 (1902). "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought." *Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.); accord *Geneva Furniture Mfg. Co.* v. *S. Karpen & Bros.*, 238 U.S. 254, 258-259 (1915).

2. In 28 U.S.C. 1331, Congress broadly granted the federal district courts "jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Under that statute, "jurisdiction is sufficiently established by *allegation* of a claim under the Constitution or federal statutes." *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 279 (1977) (em-

phasis added); see *Duke Power*, 438 U.S. at 70-71. "If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has." *Montana-Dakota Utils.*, 341 U.S. at 249.

Thus, "where the complaint, as here, is drawn so as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions * * *, must entertain the suit." *Bell*, 327 U.S. at 681-682. Those "exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-683. Unless one of those exceptions applies, a district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; accord *Verizon*, 535 U.S. at 643; *Steel Co.*, 523 U.S. at 89.

3. Under that standard, the district court had subject matter jurisdiction to adjudicate petitioner's Title VII claim. Petitioner alleged a claim under a federal statute (Title VII) by claiming that respondent violated that statute and seeking relief under it. See Pet. App. 1, 2. The lower courts recognized that if respondent's delivery drivers or owners were considered "employees" under Title VII, respondent would be an "employer" under that statute, and petitioner would be entitled to judgment in her favor. See, *e.g.*, *id.* at 4. Because, as in *Steel Co.*, petitioner "wins under one construction of [a federal statute] and loses under another," the district

court had subject matter jurisdiction to consider her claim. 523 U.S. at 89; accord *Verizon*, 535 U.S. at 643; *Bell*, 327 U.S. at 684-685.

Nor is petitioner's federal claim so insubstantial or frivolous as to warrant dismissal for lack of subject matter jurisdiction. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974)); accord *Duke Power*, 438 U.S. at 70; *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993). That standard is not remotely satisfied here. As the court of appeals noted, "whether an individual is an 'employee' for Title VII purposes is a fact-intensive inquiry, and as with most employee-status cases, there are facts pointing in both directions." Pet. App. 17.[1]

B. The Text, Structure, And Context Of Title VII And The 15-Employee Requirement Demonstrate That The Requirement Is Not Jurisdictional

To be sure, Congress's constitutional authority to "constitute Tribunals inferior to the supreme Court" (U.S. Const. Art. I, § 8, Cl. 9) authorizes it to restrict the

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[1] Although this Court has held that a suit may be dismissed for lack of subject matter jurisdiction when the federal claims are immaterial or frivolous, it has also questioned the accuracy of calling such dismissals jurisdictional. See, *e.g.*, *Bell*, 327 U.S. at 683 (citing *Fair*, 228 U.S. at 25). Because petitioner's Title VII claim is neither immaterial nor frivolous, this Court need not consider in this case whether or under what circumstances such dismissals are truly jurisdictional.

lower courts' subject matter jurisdiction based on a wide variety of factors, some of which might also be relevant to the merits of a case. See generally *Palmore* v. *United States*, 411 U.S. 389, 400-401 (1973). For example, Congress has provided that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by* a vessel on navigable water." 46 U.S.C. App. 740 (emphasis added). Under that unusual provision, the proximate cause of the damage or injury is relevant both to the federal courts' jurisdiction and to the merits of a plaintiff's claim. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-537 (1995). See *Mt. Healthy*, 429 U.S. at 278-279 (holding that 28 U.S.C. 1343, which grants federal courts jurisdiction over actions brought to redress the deprivation of federal rights under color of state law, requires an inquiry into "whether a statutory action had in fact been alleged"); *FDIC* v. *Meyer*, 510 U.S. 471, 479 (1994) (noting that the Federal Tort Claims Act, 28 U.S.C. 1346(b), "describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable").

1. Nothing in Title VII, however, reflects an intent to impose any limitations on Section 1331's broad grant of subject matter jurisdiction. Quite to the contrary, Congress confirmed that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter [Title VII]." 42 U.S.C. 2000e-5(f)(3). While that provision is phrased slightly differently than Section 1331—it applies to actions "brought under" Title VII, while Section 1331 applies to actions "arising under" federal law—the

difference in phrasing is immaterial. As this Court explained in construing an analogous jurisdictional provision, the phrase "actions 'brought under'" a federal statute encompasses all "suits *contending* that [the statute] contains a certain requirement." *Steel Co.*, 523 U.S. at 93 (quoting 42 U.S.C. 11046(c)). "Surely [petitioner] has 'brought' her action under Title VII, in the sense that she has endeavored to plead that an employer covered by Title VII has violated its prohibition." *Da Silva* v. *Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000).

That is not to say that Section 2000e-5(f)(3) is surplusage. When Congress enacted that provision in 1964, Section 1331 conferred jurisdiction over claims arising under federal law only when the amount in controversy exceeded $10,000. 28 U.S.C. 1331(a) (1964). Section 2000e-5(f)(3) therefore *expanded* the federal courts' jurisdiction to include all Title VII claims, without regard to the amount in controversy. Now that Section 1331 no longer contains an amount in controversy requirement, the remaining effect of Section 2000e-5(f)(3) is to confirm that Congress intended the federal courts to have subject matter jurisdiction over *all* Title VII claims, without limitation.

A contrary interpretation would be illogical. Every action "brought under" Title VII necessarily alleges that an employer (or other covered entity, such as a union or employment agency) engaged in an unlawful employment practice. If the 15-employee requirement were jurisdictional, then every other required element of the plaintiff's case would presumably be jurisdictional as well, including the other limitations on the definition of employer, see 42 U.S.C. 2000e(b), all of the limitations on the definitions of other covered entities, see 42 U.S.C. 2000e(c) and (d), proof that the employer or other cov-

ered entity engaged in an unlawful employment practice, see 42 U.S.C. 2000e-2, 2000e-3, and numerous other matters. But just as in *Steel Co.*, it would be "unreasonable to read [the statute's jurisdictional provision] as making all the elements of the cause of action * * * jurisdictional," and thereby "turn every statutory question * * * into a question of jurisdiction." 523 U.S. at 90, 92.

This Court recognized as much in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), when it held that another of Title VII's statutory requirements, the filing of a timely charge of discrimination with the EEOC, "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." This Court relied primarily on the absence of any relevant limitation in the text of Title VII's jurisdictional provision:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-394 (footnote omitted). In *Yellow Freight Systems, Inc.* v. *Donnelly*, 494 U.S. 820, 825 (1990), this Court similarly noted that the "plain text" of 42 U.S.C. 2000e-5(f)(3) "affirmatively describes the jurisdiction of the federal courts," and the Court relied primarily on the absence of any limiting language in that provision in

holding that state courts have concurrent jurisdiction with federal courts over Title VII claims. So too here, nothing in Title VII's broad jurisdictional provision limits the courts' subject matter jurisdiction based on *any* element of the cause of action, much less the number of a defendant's employees.

2. It would be especially unreasonable to treat the 15-employee requirement as a question of subject matter jurisdiction in light of the structure of the relevant provisions of Title VII. The 15-employee requirement is set forth as one of several elements of the definition of "employer," which is included in the section of Title VII entitled "Definitions." 42 U.S.C. 2000e(b). Nothing in the definition of "employer" refers in any way to the "jurisdiction" of the courts, see *ibid.*; nor does Title VII's jurisdictional provision make any reference to the term "employer," see 42 U.S.C. 2000e-5(f)(3). Instead, that term is relevant in this case because it is used in the provisions of the statute defining "unlawful employment practices" (42 U.S.C. 2000e-2, 2000e-3)—*i.e.*, the substantive "rights or obligations of the parties," which are precisely what this Court has held to be non-jurisdictional, *Landgraf*, 511 U.S. at 274; see pp. 8-9, *supra*.

More generally, a definitional section would be an unlikely place to find a limitation on the courts' subject matter jurisdiction. That is particularly true in the case of a statute that contains an express jurisdictional provision that does not use the defined word. See *Kontrick* v. *Ryan*, 540 U.S. 443, 453 (2004) (holding that statutory requirement was not jurisdictional, in part because "[t]he provision conferring jurisdiction" made no reference to it); *Verizon*, 535 U.S. at 644 (holding that statu-

tory provision that did "not even mention subject-matter jurisdiction" did not limit such jurisdiction).[2]

3. Treating the 15-employee requirement as non-jurisdictional not only represents the best reading of the text, it also best accommodates the fact-intensive nature of the inquiry. "[I]n most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999). The definition of "employer," however, refers in relevant part to a person who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). As this case illustrates, that inquiry can be factually complex. A court must decide not only how many people worked at a company for 20 or more weeks during a year, but also how many of those people are considered "employees" under the act. See, *e.g.*, *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 449-451 & n.10 (2003) (explaining how to determine whether shareholders and directors are employees). Resolution of those issues in this case required an additional round of discovery, additional briefing, and a further request by the district court for more information. See p. 4, *supra*. The lower courts then applied multiple multi-part tests to determine whether respondent's delivery drivers and owners were "employees,"

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[2] Title VII contains a separate jurisdictional provision for suits brought by the government to enjoin a pattern or practice of discrimination. 42 U.S.C. 2000e-6(b). Like 42 U.S.C. 2000e-5(f)(3), that provision does not refer in any way to the definition of "employer." Instead, it broadly confers jurisdiction over all pattern-or-practice suits, without limitation, by stating that "[d]istrict courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section." 42 U.S.C. 2000e-6(b).

and there was even a dispute about whether two of the owners were in fact owners. See, *e.g.*, Pet. App. 12, 16, 18-19.

It would make little sense to base the courts' subject matter jurisdiction on such complex factual issues. "[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas*, 526 U.S. at 583. Thus, treating the question as jurisdictional "might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets." *Nesbit* v. *Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003), cert. denied, 541 U.S. 959 (2004). As Judge Easterbrook noted for the Seventh Circuit, the question whether a company had 15 or more workers who qualified as "employees" for each working day in 20 or more weeks in a calendar year is "not the sort of question a court (including appellate court) must raise on its own" when the parties have not raised or disputed the issue, "which a 'jurisdictional' characterization would entail." *Sharpe* v. *Jefferson Distrib. Co.*, 148 F.3d 676, 678 (1998).

Even in cases where the parties raise the 15-employee issue at the outset, it is far more practical for courts to consider that issue along with the other factual issues in the case, instead of as a threshold jurisdictional matter. Because courts must address their subject matter jurisdiction before turning to the merits of a claim, *Steel Co.*, 523 U.S. at 94-95, "[t]o hold the requirement jurisdictional * * * implies that a court would need to decide whether an entity employed more than fifteen individuals before reaching a Title VII action's merits—even if the merits were more easily resolved than the 'jurisdictional' question." *Nesbit*, 347 F.3d at 83. Moreover, consolidated discovery and fact-finding on all

issues is far more efficient than threshold jurisdictional proceedings on the 15-employee requirement, in part because it would not necessitate successive rounds of potentially duplicative discovery. That approach is also more consistent with Congress's conferral of the right to a jury trial in Title VII cases, see 42 U.S.C. 1981a(c), because jurisdictional facts are typically found by courts, not juries, see *Grubart*, 513 U.S. at 537-538.

Treating the requirement as non-jurisdictional would also prevent parties from belatedly raising the 15-employee requirement in response to an adverse decision. That point is especially important in cases, like this one, where the plaintiff alleged state law claims as well as a Title VII claim, and the district court took supplemental jurisdiction over the state law claims under 28 U.S.C. 1367. Based on its dismissal of the federal claim for lack of jurisdiction, the district court vacated its judgment not only on petitioner's Title VII claim, but also on her state law claims. Pet. App. 23; see 16 *James Wm. Moore's Federal Practice* § 106.66[1], at 106-86 to 106-87 (3d ed. 1997). As the district court recognized, that outcome is "unfair" to the prevailing party and a "waste of judicial resources." Pet. App. 47. It also creates odd incentives. In *Da Silva*, after the defendant unsuccessfully challenged the district court's jurisdiction based on the 15-employee requirement but ultimately prevailed on the merits for other reasons, *both* parties switched positions on appeal, with the *plaintiff* arguing that the district court lacked jurisdiction and that the court's judgment on the state law claims should therefore be vacated so that she could re-litigate them in state court. 229 F.3d at 361.

If the 15-employee requirement were truly jurisdictional, it would also follow that the relevant time period

for measuring the defendant's workforce would be the time when jurisdiction is invoked, *i.e.*, the filing of the suit, rather than the time period of the underlying conduct. See, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993); *Minneapolis & St. Louis R.R.* v. *Peoria & Pekin Union Ry.*, 270 U.S. 580, 586 (1926). But such a rule would make little sense, and "[c]ourts consistently have held that" the definition of employer "refers to the year in which the alleged discrimination occurred." *Komorowski* v. *Townline Mini-Mart & Rest.*, 162 F.3d 962, 965 (7th Cir. 1998); accord Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1307 (3d ed. 1996). If the 15-employee requirement were jurisdictional, and thus measured at the time of a suit's filing, employers could eliminate potential liabilities simply by reducing their workforce. Indeed, the very act of firing the fifteenth employee for an unlawful reason could exempt the employer from liability if it did not fill the position before a suit was filed.

It would have been quite strange for Congress to have created such a scheme in the context of a statute designed to provide a remedy for aggrieved employees. "Congress of course did not create such a strange scheme." *Steel Co.*, 523 U.S. at 93. To the contrary, Congress required that Title VII cases be "in every way *expedited*," not *hampered* with cumbersome jurisdictional rules. 42 U.S.C. 2000e-5(f)(5) (emphasis added). The statutory text, structure, and context make clear that the 15-employee requirement does not limit the courts' subject matter jurisdiction.

C. Neither Respondent Nor The Courts Of Appeals That Have Held The Issue To Be Jurisdictional Have Advanced A Persuasive Reason For Their Conclusion

The court of appeals did not provide any reasoning in support of its contrary conclusion. Instead, it considered itself bound by circuit precedents that themselves lacked any reasoning on the relevant point. See Pet. App. 7-9 (citing *Greenlees* v. *Eidenmuller Enters., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994); *Womble* v. *Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989); *Dumas* v. *Town of Mt. Vernon*, 612 F.2d 975, 980 (5th Cir. 1980)).

Nor have the decisions of the other courts of appeals that have held the requirement to be jurisdictional been long on analysis—a point frequently noted by the courts of appeals that have held the requirement not to be jurisdictional. See, *e.g.*, *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (noting that "none of the courts has explained *why* the question is jurisdictional," and holding that it is not jurisdictional); *Nesbit*, 347 F.3d at 80-81 (same); *Da Silva*, 229 F.3d at 364 (same). What little reasoning those courts have provided is unpersuasive.

1. The Eleventh Circuit stated that the 15-employee limitation is jurisdictional because it "addresses whether Title VII applies in this case." *Scarfo* v. *Ginsberg*, 175 F.3d 957, 961 (1999), cert. denied, 529 U.S. 1003 (2000). The Tenth Circuit similarly held that a comparable requirement in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, is jurisdictional because it "is directed to whether the defendant falls within the statute." *Trainor* v. *Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 n.2 (2002). Those rationales are unavailing because whether a statute applies to a particular case or defendant turns on the scope of conduct the statute pro-

hibits and the scope of the private right of action it authorizes—considerations that are generally part and parcel of whether the plaintiff can state a valid cause of action, *not* whether the courts have subject matter jurisdiction.

"[T]he scope of the * * * right of action * * * goes to the merits" of a claim, not the courts' jurisdiction to adjudicate it. *Steel Co.*, 523 U.S. at 92; see *id.* at 96; pp. 8-10, *supra*. In keeping with that principle, this Court has held that a variety of issues relevant to the "applicability" of a statute do not affect the courts' subject matter jurisdiction, including: whether the Jones Act applies to actions by alien seamen against foreign defendants, *Romero*, 358 U.S. at 357-359; *Lauritzen*, 345 U.S. at 573-575; whether a crime occurred on Indian land, *Louie* v. *United States*, 254 U.S. 548, 550-551 (1921); and whether transactions occurred in interstate commerce, *Binderup*, 263 U.S. at 305-306, 309.

Just as subject matter jurisdiction does not ordinarily turn on the "applicability" of a statute to a particular case, so too it does not ordinarily turn on whether a defendant is subject to suit. This Court has held, for example, that whether a defendant is a "person" subject to suit under 42 U.S.C. 1983 is not a question of subject matter jurisdiction under 28 U.S.C. 1331. *Mt. Healthy*, 429 U.S. at 277-279. Similarly, "[w]hether [a statute] exempts the Postal Service from [judicial] review" is non-jurisdictional, because it is "in essence a question whether Congress intended to allow a certain cause of action against the Postal Service," and "[w]hether a cause of action exists is not a question of jurisdiction." *Air Courier Conf. of Am.* v. *American Postal Workers*

Union, 498 U.S. 517, 523 n.3 (1991).[3] See 2 *James Wm. Moore's Federal Practice* § 12.30[2], at 12-36 (3d ed. 1997) ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits related determination.") (citing *St. Francis Xavier*, 117 F.3d at 622-624).

That is not to say that Congress lacks authority to base a grant of subject matter jurisdiction on such factors. Subject matter jurisdiction can and does turn in appropriate cases on whether the United States is a party, see, *e.g.*, 28 U.S.C. 1345, 1346; whether the defendant is a foreign state or member of a foreign mission, see 28 U.S.C. 1330(a), 1351; or whether the parties are citizens of different States, see 28 U.S.C. 1332(a). Moreover, "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986).

But the Tenth and Eleventh Circuits erred to the extent that they suggested that questions regarding the "applicability" of statutes or the classes of people who may be sued under them are *necessarily* jurisdictional, and nothing in Title VII expresses an intent to limit the courts' subject matter jurisdiction on that basis. See pp. 12-16, *supra*. Under Title VII, "[a] plaintiff's inability to demonstrate that the defendant has 15 employees is just

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[3] This Court has repeatedly held that whether a statute creates a private right of action is a merits, not a jurisdictional, inquiry. *E.g.*, *Verizon*, 535 U.S. at 642-643; *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 430-431 (2002); *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 365 (1994); *Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979); *Duke Power*, 438 U.S. at 71.

like any other failure to meet a statutory requirement." *Sharpe*, 148 F.3d at 677.

2. Although the D.C. Circuit held an analogous provision of the ADA to be non-jurisdictional, *St. Francis Xavier*, 117 F.3d at 623-624, one judge disagreed with that conclusion and stated, in a separate concurring opinion, that "[w]hile it is true * * * that nothing in Title VII (or the ADA) expressly limits the district court's subject matter jurisdiction, to me it is more important that nothing in Title VII or the ADA *extends* the district court's jurisdiction to cases not involving the requisite number of employees," *id.* at 626.

However, 42 U.S.C. 2000e-5(f), like 28 U.S.C. 1331, expressly extends the federal courts' subject matter jurisdiction to include *all* Title VII claims. See pp. 12-14, *supra*. Absent some basis for limiting that express grant of subject matter jurisdiction (and there is none here), the federal courts have jurisdiction to adjudicate all such claims, including claims that lack merit under the 15-employee requirement.

3. In the course of holding that the 15-employee requirement is *not* jurisdictional, the Third Circuit stated that "[p]erhaps the most plausible reason for finding that the * * * requirement is jurisdictional is that it concerns a 'dispute[] as to the existence of a fact that is essential to a constitutional exercise of Congress's power to regulate.'" *Nesbit*, 347 F.3d at 81 (quoting *Da Silva*, 229 F.3d at 363). As the Third Circuit recognized, however, that argument is "unconvincing" for two independently sufficient reasons. *Id.* at 82.

First, Congress did not base its authority to enact Title VII on the 15-employee requirement. Instead, the definition of "employer" also requires that the defendant be "in an industry affecting commerce." 42 U.S.C.

2000e(b). *That* requirement invokes Congress's constitutional authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, without regard to whether an employer has 14, 15, or 16 employees. See generally *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 253 (1991) (recognizing that Title VII is one of "[m]any acts of Congress [that] are based on the authority of that body to regulate commerce among the several States").[4]

Second, even those matters that are essential to Congress's authority to enact legislation speak only to Congress's legislative jurisdiction, not the courts' subject matter jurisdiction. "'[T]he authority of a state to make its law applicable to persons or activities,' * * * is

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[4] Two House members stated, in the course of opposing the entire Civil Rights Act of 1964, that "[t]he bill proceeds upon a theory * * * that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured." H.R. Rep. No. 914, 88th Cong., 1st Sess. 2475 (1963) (separate minority views of Reps. Poff and Cramer). Taken as a whole, the legislative history does not support that statement. Instead, the floor debate that preceded the enactment of Title VII, as well as the floor debate that preceded Congress's reduction of the employee minimum from 25 to 15 in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, suggests that some Members were concerned that including all small businesses in the scope of Title VII would impose bureaucratic and litigation costs that small companies could not bear, would unfairly intrude in the culture of small businesses, especially ethnic businesses, and would make full enforcement of the bill impractical. See, *e.g.*, 110 Cong. Rec. 13,085, 13,092 (1964) (Cotton); 118 Cong. Rec. 2388-2390 (1972) (Stennis); *id.* at 2391-2394 (Cotton); *id.* at 2409-2411 (Fannin). "Thus, the fifteen-employee threshold appears to be motivated by policy—to spare small companies the expense of complying with Title VII—rather than Commerce Clause considerations." *Nesbit*, 347 F.3d at 82; cf. *Clackamas*, 538 U.S. at 447 (explaining that the comparable employee threshold in the ADA was intended to "eas[e] entry into the market and preserv[e] the competitive position of smaller firms").

quite a separate matter from 'jurisdiction to adjudicate.'" *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (quoting 1 Restatement (Third) of Foreign Relations Law of the United States 231 (1987)); see generally Restatement (First) Conflict of Laws § 60 (1934) (discussing legislative jurisdiction). Such matters "raise a question, not of the jurisdiction of th[e] court, but of the jurisdiction of the United States." *Louie*, 254 U.S. at 550; see *Nesbit*, 347 F.3d at 82 ("Elements of a claim that are called jurisdictional because they relate to Congress's jurisdiction remain questions of the merits.") (quoting *Kulick* v. *Pocono Downs Racing Ass'n*, 816 F.2d 895, 898 (3d Cir. 1987)).

Thus, this Court has treated as non-jurisdictional the interstate commerce element of a federal cause of action, *Binderup*, 263 U.S. at 305-306, 309, and a statutorily-required nexus to Indian land, *Louie*, 254 U.S. at 550-551. In criminal cases, the interstate commerce element is routinely determined by juries, not judges, precisely because it is not jurisdictional. See, *e.g.*, *Martin* v. *United States*, 333 F.3d 819, 820 n.2 (7th Cir.), cert. denied, 540 U.S. 1083 (2003); *United States* v. *Ryan*, 41 F.3d 361, 363 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1082 (1995). Thus, even if (contrary to fact) Congress had rested its authority to enact Title VII on whether a defendant had a particular number of qualifying employees, that question of *legislative* authority would not be relevant to the *courts'* subject matter jurisdiction.

4. Respondent has argued (Br. in Opp. 1) that "this Court has already indicated that [the 15-employee] limitation is a jurisdictional requirement." Although this Court's precedents contain scattered references to the

term "jurisdiction" in connection with Title VII's definition of "employer," this Court has never held that the definition limits the courts' subject matter jurisdiction. See *Nesbit*, 347 F.3d at 82-83.

"'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'" *Kontrick*, 540 U.S. at 454 (quoting *Steel Co.*, 523 U.S. at 90); see *ibid.* ("Courts, including this Court * * * have been less than meticulous" in their use of "the term 'jurisdictional.'"). At times, the courts have engaged in "profligate use" of that term. *Carlisle* v. *United States*, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring) (quoting *Center for Nuclear Responsibility, Inc.* v. *United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (Ginsburg, J., dissenting)).

Moreover, this Court has "often said that drive-by jurisdictional rulings * * * have no precedential effect." *Steel Co.*, 523 U.S. at 91. That follows *a fortiori* for offhand characterizations of an issue in *dictum*. Only when a court squarely confronts and decides a jurisdictional question does its decision have precedential effect on that question. See, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). In *Zipes*, this Court therefore declined to follow its previous decisions referring to Title VII's timely-filing requirement as "jurisdictional," in part because "the legal character of the requirement was not at issue in those cases." 435 U.S. at 395.

This Court's cases discussing the definition of "employer" are even less relevant than those the Court held not to be controlling in *Zipes*. In *Walters* v. *Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 204 (1997), this Court considered the question whether "an employer 'has' an employee on any working day on

which the employer maintains an employment relationship with the employee." The Court never stated that the issue was jurisdictional, or even considered whether it was jurisdictional. Respondent is correct (Br. in Opp. 2) that the Court reversed a decision of the court of appeals that had affirmed a decision of the district court dismissing for lack of subject matter jurisdiction. 519 U.S. at 204-205, 212. But the Court's tacit acceptance of the procedural posture had no effect on the proceedings, and thus cannot be considered a precedent on that point. See *Steel Co.*, 523 U.S. at 91 (declining to follow case treating issue as jurisdictional because nothing "*turned upon* whether [the issue] was technically jurisdictional" in that case).[5]

Respondent argues (Br. in Opp. 2-3) that the *Walters* Court must have concluded that the requirement is jurisdictional because it held that the defendant had more than 15 employees under the correct legal standard, instead of remanding for consideration by the trier-of-fact. But the parties to that case apparently stipulated to all relevant facts, leaving no factual disputes for a trier-of-fact to resolve on remand, regardless of whether the question was jurisdictional. See 519 U.S. at 212.

In *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 119 n.5 (1988), a case that did *not* involve the 15-employer requirement, a plurality of this Court remarked that "[r]eactivation of state proceedings after the conclusion of federal proceedings serves [a] useful

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[5] In *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 n.2 (1984), the Court expressly found it unnecessary to decide whether a Title VII claim should have been dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), instead of for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), because, as in *Walters*, nothing turned on the distinction in that case.

function," in part because "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees." That offhand reference to "jurisdiction" is not only passing *dictum* in a footnote of a plurality opinion, it addresses only the relative *administrative* jurisdictions of the EEOC and the state agencies. It says nothing about the courts' subject matter jurisdiction, which was not at issue in that case.

Finally, this Court's decision in *EEOC* v. *Arabian American Oil Co.*, describes as "jurisdictional" the portion of the definition of "employer" that requires that the defendant be "engaged in an industry affecting commerce." 499 U.S. at 249, 253. The Court's opinion makes clear, however, that it was referring to Congress's "legislative jurisdiction" to regulate interstate commerce under the Commerce Clause (*id.* at 253), not the courts' subject matter jurisdiction to entertain Title VII claims. See *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting). As explained above, those are distinct inquiries (see pp. 24-25, *supra*), and nothing in *Arabian American Oil Co.* even addresses the courts' subject matter jurisdiction, let alone holds that the 15-employee requirement limits that jurisdiction.[6]

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[6] The committee reports accompanying the 1972 amendments to Title VII, which reduced the required number of employees from 25 to 15 (see p. 24 note 4, *supra*), sometimes refer to that change as an expansion of "jurisdiction." See, *e.g.*, H.R. Rep. No. 238, 92d Cong., 1st Sess. 7, 20 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 9, 32 (1971). The reports are not clear as to whether the references are to legislative or subject matter jurisdiction. Those same reports and the conference report also refer, however, to the amendment as an expansion of Title VII's "coverage," which seems inconsistent with the latter view. See, *e.g.*, H.R. Rep. No. 238, *supra*, at 1; S. Rep. No. 415, *supra*, at 2, 8, 35; S. Rep. No. 681, 92d Cong., 2d Sess. 15 (1972) (conference report). In any event, just as passing statements by this Court referring to an issue

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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as "jurisdictional" do not have precedential significance (see p. 26, *supra*), so too Congress's passing use of that term in legislative history does not govern the question, especially given the inconsistent treatment of the provision in the legislative history.

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No. 04-944

In the

Supreme Court of the United States

JENIFER ARBAUGH,
Petitioner,

v.

Y & H CORPORATION, D/B/A THE MOONLIGHT CAFE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, FLORIDA, HAWAII, KANSAS, OHIO, OREGON, UTAH, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 701(b) of Title VII of the 1964 Civil Rights Act applies the Title VII prohibition against employment discrimination to employers with fifteen or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim? *See* Pet. at i.

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INTEREST OF AMICI

State agencies and officers are subject to suit under Title VII in the same manner as private defendants. States, however, are not treated as unitary "employer[s]" for Title VII purposes. Rather, a State's "own distinctions between its governmental subdivisions" are presumptively respected as part of its "ability to shape its own institutions within constitutional bounds." *Lyes v. Riviera Beach*, 166 F.3d 1332, 1344 (11th Cir. 1999) (en banc). Accordingly, when determining how many employees a state "employer" has – and, in turn, whether it is subject to Title VII at all – the unit of measurement is not the State, as such, but, instead, the responsible office or agency. *See Laurie v. Alabama Ct. of Crim. Apps.*, 256 F.3d 1266, 1270-73 (11th Cir. 2001) (court, not State, was "employer"); *Oden v. Oktibbeah County*, 246 F.3d 458, 465 (5th Cir. 2001) (sheriff, not county); *Holman v. State of Indiana*, 211 F.3d 399, 401 n.1 (7th Cir. 2000) (agency, not State).

Many state agencies, of course, have fewer than 15 employees and, accordingly, are categorically exempt from Title VII. *See, e.g.*, State of Alabama, Personnel Department, *Report: Employees by Agency and Employment Type* (July 22, 2005). Not surprisingly, these same small state agencies often operate on shoestring budgets; they simply cannot afford to litigate a Title VII case, the cost of which (verdict aside) often runs into the hundreds of thousands of dollars. And, indeed, it was *precisely* this "potentially crushing expense" of compliance and litigation that led Congress to exempt small employers from Title VII's scope in the first place. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.).

Only a holding that Title VII's 15-employee threshold limits courts' subject-matter jurisdiction respects Congress' clear intent to shield small employers from the burdens of litigation. A jurisdictional understanding will enable a judge to determine numerosity – and, thus, whether Title VII applies at all – at the very outset of a case. By contrast, petitioner's position, under which the numerosity issue would routinely be pushed deep into a case and tried to a jury

alongside ordinary merits questions, actually invites protracted litigation and thus subverts Congress' intent.

SUMMARY OF ARGUMENT

This case is about who decides the numerosity issue, and when. If, as Arbaugh claims, numerosity is just another element of a Title VII claim, it is presumptively an issue for the jury, and will oftentimes be decided late in a case. If, by contrast, numerosity is jurisdictional, it can (and ordinarily will) be decided by a judge at the very outset of litigation. Because, relative to other issues in a Title VII case, numerosity is remarkably straightforward – and, typically, objectively verifiable – there is every reason to decide it promptly, and no good reason to delay.

Congress' clear intent in establishing the numerosity requirement underscores the importance of deciding the issue up front. Congress knew that most small employers simply can't afford the costs of litigating a Title VII case; accordingly, it drew a bright line and categorically exempted employers with fewer than 15 employees from suit. Any rule that subjects those same small employers to the burdens of protracted litigation – as petitioner's merits-based view of numerosity assuredly would – risks bankrupting small firms and thus contravenes Congress' intent.

Traditional indicia of statutory meaning demonstrate that the numerosity requirement is jurisdictional. Text and structure show that numerosity is distinct from ordinary merits issues in that it is a necessary precondition to Title VII's applicability in a writ-large sense. If numerosity is absent, Title VII *does not apply at all*, and plaintiff's case-specific specific allegations are rendered irrelevant. This Court's cases indicate that where, as here, a federal statute is by its own terms categorically inapplicable, jurisdiction is lacking.

Title VII's legislative history confirms the numerosity requirement's jurisdictional character. Not only does the legislative history repeatedly and expressly refer to numerosity in "jurisdictional" terms, but it also reveals Congress' intent

to shield small employers from the burdens of litigation – an intent that can be realized only through a jurisdictional understanding of numerosity.

Both this Court and the EEOC have consistently characterized numerosity as a jurisdictional requirement. The EEOC has done so in its (i) briefs to this Court, (ii) compliance manual, (iii) guidance documents, and (iv) adjudicative decisions. The point is not that this Court is bound by these prior characterizations; the point is that this Court and the EEOC have (up to now) always treated numerosity as jurisdictional because that is the best understanding of it.

None of Arbaugh's policy arguments against treating numerosity as a jurisdictional requirement is persuasive. And, notably, none of the concerns that Arbaugh raises has ever materialized in any significant way, notwithstanding the fact that for the better part of the last quarter century most courts have held numerosity to be jurisdictional.

ARGUMENT

"It is a principle of first importance that the federal courts are courts of limited jurisdiction." 13 C. Wright & A. Miller, *Federal Practice & Procedure* §3522, at 60 (2d ed. 1984). They "possess only that power authorized by Constitution and statute," and their authority may not be "expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "[I]t is to be presumed that a cause lies outside [a federal court's] limited jurisdiction," and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Accordingly, the question here, as Judge Sentelle has observed, is *not* whether Title VII expressly limits federal courts' subject-matter jurisdiction but, rather, whether Title VII expressly "*extends* the district court's jurisdiction to cases not involving the requisite number of employees." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 626 (D.C. Cir. 1997) (concurring opinion).

Subject-matter jurisdiction denotes a court's power – not so much its "physical power," as Justice Holmes once de-

scribed it, *McDonald v. Mabee*, 243 U.S. 90, 91 (1917), but rather, as this Court has more recently clarified, its legitimate "adjudicatory authority," *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *accord, e.g., Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 778 (2000); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). Specifically, this Court has said, "the label 'jurisdictional'" applies not to "claim-processing rules" or rules of "practice and procedure" but, instead, to prescriptions that delineate "the classes of cases ... falling within a court's adjudicatory authority," *Kontrick*, 540 U.S. at 453, 455, or, alternatively, the "cases ... courts are competent to adjudicate," *Scarborough v. Principi*, 541 U.S. 401, 414 (2004).

The question in this case, therefore, is whether Congress actually meant to give federal courts the *authority* to adjudicate Title VII suits against employers with fewer than 15 employees. The answer to that question - which this Court has said requires practical "deductions which may be drawn from [the applicable] congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts," *Aldinger v. Howard*, 427 U.S. 1, 17 (1976) - is plainly no. And no formalism concerning, for instance, the placement of the 15-employee threshold in one provision of Title VII as opposed to another (*see infra* at 11-13) can change that real-world assessment. In fact, as we will explain, the best evidence of congressional intent combines with potent practical considerations to support a jurisdictional understanding of the numerosity requirement.

* * *

Before delving into the guts of the interpretive question here, it will be useful to set the stage briefly. What, exactly, rides on the question presented? As a practical matter, the Court's decision here will determine *who* decides the numerosity issue, and *when*. If, as Arbaugh argues, numerosity is just another element of a Title VII claim, then it, like other merits issues, is presumptively an issue for the jury. Simply by alleging numerosity, a plaintiff can defeat a Rule 12(b)(6)

motion, and by raising any factual dispute he can defeat summary judgment and require a full-blown trial. If, by contrast, numerosity is a jurisdictional requirement, any litigation concerning that issue will be tried – ordinarily, at the very outset of litigation – to a judge alone, who can himself "resolve factual issues." 5B C. Wright & A. Miller, *Federal Practice & Procedure* §1350, at 160 & n.47 (3d ed. 2004).

With that in mind, consider this practical point: Unlike many other issues in a Title VII case – the resolution of which turns on dueling versions of events and debatable interpretations of motive – *employee numerosity an objectively verifiable fact*. It is susceptible of a single correct answer. At the end of the day, either an employer has 15 employees or it doesn't. Accordingly, for plaintiffs like Arbaugh, who sue employers that, in fact, have fewer than 15 employees, numerosity is a lose-lose proposition. A plaintiff in Arbaugh's shoes will either lose *early* or lose *late*.

Given that fact, what possible justification could there be for delaying the inevitable – for putting off the numerosity determination or sending it, along with other case-specific merits questions, to a jury? Judicial efficiency, by contrast, would seem to dictate resolving the question at the earliest possible juncture. There are, to be sure, reasons why Title VII plaintiffs might prefer delay, but none of them seems particularly compelling, or even legitimate. One, of course, is to allow an employee to scoop up a windfall in the event (as happened here) that a small employer's trial attorney simply forgets to raise the issue. But that isn't much of a reason; by virtue of an attorney's oversight, a plaintiff is loosed to sue and recover from the very kind of defendant that Congress sought to protect against suit and recovery.

Another reason plaintiffs might prefer to postpone the numerosity determination is that they know – as did Congress – that many small employers simply cannot afford to incur the costs of litigating a Title VII case. Accordingly, if a plaintiff can avoid an early numerosity-based dismissal by jumbling the numerosity issue together with fact-specific

merits issues – thus pushing it deeper into the case – he will be well-positioned strategically to coerce a favorable settlement from his cash-strapped adversary. But, there again, the very object is to get money from a defendant whom Congress knew couldn't afford it and for that reason expressly exempted from Title VII's coverage.

Finally, Title VII plaintiffs would almost certainly rather have juries than judges deciding the numerosity issue. The reason, as summarized in a law review article that Arbaugh cites, is because "[w]hether a judge or a jury decides the facts in question will frequently determine the outcome of the case" – and, more specifically, because "a jury might be expected to be more sympathetic to a plaintiff on close calls, especially" where the allegations of discrimination are "egregious." Stefania A. Di Trolio, Comment, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 Seton Hall L. Rev. 1247, 1250 (2003). But that, with respect, is really just an argument for jury nullification. The premise – which may well be accurate as a sociological matter, which is what concerns us – is that juries will allow the salaciousness of the allegations to color their view of employee numerosity in "close cases," and will fudge numerosity if necessary to punish bad behavior. But numerosity is a stand-alone exemption from Title VII; if an employer does not have 15 employees, then it has "complete [Title VII] immunity," *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), no matter how objectionable its alleged actions.

We will return in due course to answer Arbaugh's policy-based objections to treating numerosity as jurisdictional. The point here is that there seems to be no compelling affirmative justification for Arbaugh's contrary characterization of numerosity as a garden-variety merits issue to be decided deep in a case by a jury.

I. The Text and Structure of Title VII Demonstrate That Employee Numerosity Is Jurisdictional.

The substantive provision of Title VII at issue here, §703(a), titled "*Employer* practices," provides that –

> It shall be an unlawful employment practice for an *employer* -
>
> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a) (emphasis added). Textual and structural considerations demonstrate that §703(a)'s triggering condition - a defendant's "employer" status - is not just a garden-variety merits issue but is indeed jurisdictional in character.

A. Numerosity Is a Necessary Precondition to Title VII's Applicability and Is Thus Categorically Different From Ordinary Merits Issues.

Section 703(a) states a prohibition on "discriminat[ion]" "because of" certain protected characteristics. But as the preambular clause makes plain, the triggering condition for the application of §703(a)'s substantive antidiscrimination rule is the defendant's "employer" status. That is, if the defendant is not an "employer" within the meaning of Title VII, §703(a) *does not apply at all* - no matter how horrendous the alleged mistreatment or how transparent the motives for it. So, before one gets into the particulars of an individual's discrimination claim - and all of the various plaintiff-specific inquiries analysis of that claim will entail - there is an antecedent question, one that has absolutely nothing to do with plaintiff's substantive allegations: Is the defendant a Title VII "employer"? If not, the specifics of and reasons for the plaintiff's alleged mistreatment are positively irrelevant.

Section 701(b) defines the term "employer" for Title VII purposes. As relevant here, that section states that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks

in the current or preceding calendar year." 42 U.S.C. §2000e(b). Accordingly, if a defendant does not have at least 15 employees, it is not a statutory "employer" and Title VII, again, *does not apply at all*. As this Court has explained, in §701(b) Congress "expressly exempted ... small businesses" from Title VII and thereby gave them "complete immunity" from suit. *Hishon*, 467 U.S. at 78 & n.11.

Up to this point, all here seemingly agree: If a defendant does not have 15 employees, Title VII does not "appl[y]" at all and, correlatively, the defendant simply is not "covered" by or "subject to" Title VII. *See, e.g.*, Arbaugh Br. 7, 15, 16, 17, 18; Pet. at 5, 6 n.5. Indeed, the Question Presented itself recognizes that "Section 701(b) ... *applies* the Title VII prohibition against employment discrimination" set forth in §703(a) only "to employers with fifteen or more employees." Pet. at i (emphasis added). For three reasons, however, Arbaugh and her amicus argue that not even Title VII's categorical inapplicability to employers with fewer than 15 employees – and those employers' "complete immunity" from suit – suffices to make employee numerosity a jurisdictional rule. We consider those arguments in turn.

B. Where a Federal Statute Is by Its Plain Terms Categorically Inapplicable, Jurisdiction Is Lacking.

While not disputing that if an employer has fewer than 15 employees Title VII is categorically inapplicable, the Government cites a handful of decisions that it says suggest that the question whether a statute "applies," or whether a defendant is "subject to" suit, does not implicate subject-matter jurisdiction. With respect, the Government is wrong.

1. In arguing that a particular defendant's categorical immunity from suit does not affect subject-matter jurisdiction, the Government invokes *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), which it says indicates that "whether a defendant is a 'person' subject to suit under 42 U.S.C. 1983 is not a question of subject matter jurisdiction under 28 U.S.C. 1331." U.S. Br. 21. But on that score *Mt. Healthy* is ambiguous, at best. And in fact, particularly when

read in the context of the cases that immediately preceded it, *Mt. Healthy* seems to point in exactly the opposite direction. Specifically, the Court in *Mt. Healthy* noted that "if this were a §1983 action, brought under the special jurisdictional provision of 28 U.S.C. §1343 ... it would be appropriate for this Court to inquire, *for jurisdictional purposes*, whether a statutory action had in fact been alleged." *Id.* at 278-79 (emphasis added). For that proposition, the Court cited its earlier decision in *City of Kenosha v. Bruno*, which, addressing the question of subject-matter jurisdiction sua sponte, squarely held that because (at that time) a city was not a "person" within the meaning of §1983's substantive cause of action, a district court was "wrong in concluding that it had jurisdiction" of a plaintiff's §1983 claim "under §1343." 412 U.S. 507, 513 (1973). The moral seems clear enough: Where a defendant is *categorically* exempt from suit under a substantive statute, subject-matter jurisdiction (even when invoked under a separate jurisdictional provision) is lacking.

Aldinger v. Howard, 427 U.S. 1, is to precisely the same effect. There, again, this Court held squarely that because counties were not "person[s]" within the meaning of §1983's cause of action, district courts lacked subject-matter jurisdiction over them under §1343. *See id.* at 17 ("Congress excluded [counties] from liability in §1983, and therefore by reference in the grant of jurisdiction under §1343(3)."). The Court in *Aldinger* sensibly - and with an eye toward real-world functionality - held that interpretations of jurisdictional grants should be based *not* on rote formalism but, rather, on "deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts." *Id.* at 16-17. Somewhat more specifically, the Court held that "the reach of [a] statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress." *Id.* at 17.

The significance for the present case of the *Kenosha-*

Aldinger-Mt. Healthy line of reasoning[1] is plain. As was the case there, the Court is faced here with a formal jurisdictional provision (§706(f)(3)) that is separate from - and does not in so many words mention - the provision (§701(b)) that categorically exempts an identifiable class of defendants from statutory coverage. Here, as there, the Court should approach that question realistically, not formalistically, and hold that there is no jurisdiction over defendants that enjoy "complete immunity," *Hishon*, 467 U.S. at 78, from suit.

2. The Government also points to two decisions dealing with the question "whether the Jones Act applies to actions by alien seamen against foreign defendants." U.S. Br. 21 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and *Lauritzen v. Larsen*, 345 U.S. 571 (1953)). But *Romero* and *Lauritzen* are distinguishable in a critical respect. The Jones Act on its own broad terms *plainly* applied to the foreign seamen's claims; the Court expressly acknowledged as much. *See Lauritzen*, 345 U.S. at 576. The question there was whether the Court should read an applicability limitation into the language Congress had prescribed. Here, by contrast, the applicability limitation is patent on the face of the statute; by Congress' own directive, if an employer does not have 15 employees, Title VII does not apply, period. The only question here is whether, on the facts of a given case, Congress' specified limitation is met. Whether it is Congress itself (as here) or a court (as in the Jones Act cases) that fashions the applicability limitation matters, of course, for a fundamental reason: It is *Congress* that defines courts' subject-matter jurisdiction. *See Palmore v. United States*, 411 U.S. 389,

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[1] *See also ExxonMobil v. Allapatah Servs., Inc.*, 125 S. Ct. 2611, 2619 (2005) ("Congress, in enacting §1343(3), had declined (albeit implicitly) to extend federal jurisdiction over any party who could not be sued under the federal civil rights statutes."); *Finley v. United States*, 490 U.S. 545, 573 (1989) ("Congress' exclusion of municipal corporations from the definition of persons under §1983 ... evinced an intent to preclude the exercise of federal-court jurisdiction over them.").

400-01 (1973). And, indeed, in these kinds of cases – where a "shall not apply" condition is clear on the face of a statute – courts have quite sensibly treated categorical inapplicability as running to jurisdiction. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 795-97 & n.22 (1993) (Sherman Act); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 947-48 (7th Cir. 2003) (en banc) (same).

C. The Placement of the Numerosity Requirement in the "Definitions" Provision Does Not Diminish Its Jurisdictional Character.

Arbaugh also contends that employee numerosity cannot possibly be a jurisdictional requirement because it does not appear within the four corners of §706(f)(3) of Title VII, which formally assigns district courts "jurisdiction of actions brought under this subchapter." 42 U.S.C. §2000e-5(f)(3). Because, Arbaugh says, §706(f)(3) itself "contains no limitation based on the number of a defendant's employees," employee numerosity is not a jurisdictional prerequisite. Arbaugh Br. 13. But that argument proves entirely too much, as Arbaugh's own brief makes clear. Just as §706(f)(3) does not in so many words limit jurisdiction based on the number of a defendant's employees, it also (as Arbaugh quite rightly points out) does not itself "limit[] jurisdiction to actions against employers or any other type of defendant." Arbaugh Br. 7. Thus, under Arbaugh's reading, Title VII – which is titled "Equal *Employment* Opportunity"[2] and which targets "Unlawful *employment* practices"[3] – confers subject-matter jurisdiction over actions not only against tiny employers but against *non-employers*, as well. That acontextual reading of §706(f)(3) – in splendid isolation from everything else around it – cannot possibly be correct.

Arbaugh claims that *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), supports her position that in order to be

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[2] Pub. L. No. 88-352, 78 Stat. 253 (1964).

[3] 42 U.S.C. §§2000e-2, 2000e-3(a).

truly jurisdictional a requirement must necessarily appear in a statute's denominated-as-such jurisdictional provision. And at first blush, *Zipes* would appear to give Arbaugh some aid. The Court there held that Title VII's requirement that a complainant file his EEOC charge within 180 days, 42 U.S.C. §2000e-5(a), "is not a jurisdictional prerequisite to suit in federal court" but, instead, operates like a statute of limitations and is thus subject to waiver. *Id.* at 393. The Court did so, in part, on the basis that §706(f)(3) "contains no reference to the timely-filing requirement" and that "[t]he provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, [which] does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 393-94.

Zipes, however, is distinguishable on two (related) bases. First, the Court there found that the legislative history clearly showed that Congress intended Title VII's timely-filing requirement to "operate as a statute of limitations instead of a jurisdictional requirement." 455 U.S. at 394. And as the EEOC emphasized in its brief in that case, it is a principle "deeply embedded in our jurisprudence" that a statute of limitations is not jurisdictional but is instead a waivable procedural defense. Br. for EEOC at 12, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (Nos. 78-1545, 80-951). In that situation, where history and tradition decisively indicate that a particular requirement is *not* jurisdictional, it makes sense to require a heightened showing of congressional intent to the contrary. The numerosity requirement, however, is not weighed down by the same historical baggage.

Second, *Zipes* is distinguishable because the timely-filing requirement at issue there had absolutely nothing to do with the substantive scope of Title VII; it was merely a procedural, agency-housekeeping rule. Section 701(b)'s employer-numerosity requirement, by contrast, pertains precisely to Title VII's substantive scope. If an employer has fewer than 15 employees, Title VII does not apply at all and the employer has "complete immunity" from suit. *Hishon*, 467 U.S. at 78. *Zipes* and this case therefore occupy opposite

poles of the dichotomy sketched out by this Court in *Kontrick v. Ryan* and *Scarborough v. Principi*, both of which addressed claims that timely-filing rules were jurisdictional: "[T]he label 'jurisdictional'" applies not to "claim-processing rules" or rules of "practice and procedure" but, instead, to prescriptions that delineate "the classes of cases ... falling within a court's adjudicatory authority," *Kontrick*, 540 U.S. at 453, 455, or, alternatively, the "cases ... courts are competent to adjudicate," *Scarborough*, 541 U.S. at 414. *Zipes* is squarely in the former camp; this case is squarely in latter.

D. *Steel Co.* Does Not Support Petitioner's Merits-Based Understanding of Numerosity.

Finally, Arbaugh seeks to rely on language in *Steel Co. v. Citizens for a Better Environment* condemning statutory interpretations that would "mak[e] all the elements of [a] cause of action ... jurisdictional" or "turn every statutory question ... into a question of jurisdiction." 523 U.S. 83, 90, 92 (1998). It is of course true that the simple fact that a plaintiff's claim is a loser on the merits does not divest the courts of jurisdiction to hear it. But the *Steel Co.* argument is something of a red herring here. It depends on the premise that numerosity is just another garden-variety element of a Title VII claim – like proving that "discrimination" occurred and was undertaken "because of" some protected trait. If, the Government says, "the 15-employee requirement were jurisdictional, then every other required element of the plaintiff's case would presumably be jurisdictional as well ...." U.S. Br. 13.

But that deconstructionist argument – that if any statutory requirement is jurisdictional, they all must be – ignores the commonsense distinction between requirements that circumscribe Title VII's applicability in a writ-large sense and those that turn on the specifics of an individual plaintiff's treatment. Section 701(b)'s 15-employee threshold determines whether Title VII applies at all or whether, instead, the defendant is "complete[ly] immun[e]" from suit, *Hishon*, 467 U.S. at 78. Case-specific merits inquiries, by contrast, assume that Title VII applies and ask, in a writ-small sense,

whether a particular plaintiff suffered "discrimination" "because of" her race or sex. There is a very real – if intuitive – difference between a statutory coverage issue and an ordinary merits issue.

* * *

Arbaugh's formalistic arguments – that numerosity cannot be jurisdictional because Congress declined to put it in a jurisdictional clause, that if numerosity is jurisdictional so is every ordinary incident of a plaintiff's cause of action, etc. – are, with respect, part of an effort to evade a realistic appraisal of congressional intent. The question, again, is whether Congress *actually* "wanted to grant" courts authority to adjudicate Title VII suits against defendants with fewer than 15 employees. *Aldinger*, 427 U.S. at 17. Viewed through that real-world lens, the answer is no.

II. The Legislative History Confirms That Employee Numerosity Is Jurisdictional.

The Government's attempt to deal with Title VII's legislative history in two bulky footnotes (U.S. Br. 24 n.4, 28 n.6) is, with respect, unconvincing. In two important ways the legislative history strongly supports a jurisdictional understanding of Title VII's 15-employee threshold.

1. First, and most obviously, there is the proverbial smoking gun. As the Government itself acknowledges, the committee reports accompanying the 1972 amendments to Title VII, which lowered the numerosity requirement from 25 to 15, clearly and repeatedly refer to the requirement in "jurisdictional" terms. *See* H.R. Rep. No. 92-238, *reprinted at* 1972 U.S.C.C.A.N. 2137, 2142 (1972) ("extension of Title VII jurisdiction"); *id.* at 2155 ("changing the jurisdictional reach of Title VII"); *id.* at 2161 ("Jurisdiction"); S. Rep. No. 92-415, at 8 (1971) ("jurisdiction of the EEOC"); *id.* at 9 ("EEOC jurisdiction," "new jurisdictional area"); *id.* at 32 ("extension of jurisdiction"). Proponents and opponents of the change, alike, described the numerosity requirement that way. *See* H.R. Rep. No. 92-238, *supra*, at 2171 (minority views) ("addi-

tional jurisdiction bestowed on the EEOC"); *id.* at 2176 ("expansion of jurisdiction"); Subcomm. on Labor of the Comm. on Labor and Public Welfare, 3 *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1271 (1972) (hereinafter *1972 Legislative History*) (Allen) ("jurisdiction of the EEOC," "Commission's jurisdiction"). The Government dismisses these references as pertaining to Title VII's "coverage," which, it says, "seems" to be something different from jurisdiction. U.S. Br. 28 n.6. But as explained above, where, as here, an exemption from a statute's applicability is categorical, the coverage and jurisdictional inquiries converge.

2. More fundamentally, the legislative history underscores Congress' principal objective in imposing the numerosity requirement and thereby "exempting tiny employers from the antidiscrimination laws." *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.). Specifically, Congress' purpose, to which we have alluded already (*see supra* at 1, 2, 5, 6), was to "spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Id.*; *accord, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (purpose was to shield small employers from the "costs associated with defending against discrimination claims"); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) ("Congress did not want to burden small entities with the costs associated with litigating discrimination claims."). Indeed, that solicitude for small employers – and a desire to protect them from potentially bankrupting litigation costs – underlay both the original Act and the 1972 amendments. *See, e.g.*, 110 Cong. Rec. 13088 (1964) (Humphrey); *id.* at 13092 (Cotton); *id.* at 13092-93 (Morse); *1972 Legislative History*, *supra*, at 1274-79 (Stennis); *id.* at 1297-1301 (Fannin); *id.* at 1375 (Ervin).

Ultimately, both Arbaugh and the Government acknowledge that "the purpose of the employee-numerosity requirement is to protect small firms from the cost of litigation." Arbaugh Br. 18 n.21; *see also* U.S. Br. 24 n.4 (citing leg-

islative history). But they fail to come to grips with how – and to just what extent – this purpose favors a jurisdictional understanding of numerosity. Again, if, as Arbaugh would have it, numerosity were just another element of a Title VII cause of action, then it, like other merits issues, would presumptively be an issue for the jury. Merely by alleging numerosity, a plaintiff could defeat a Rule 12(b)(6) motion, and by raising any factual issue he could defeat summary judgment and require a full-scale trial. A small business would then be put to the burden of litigating numerosity – and in the process incurring potentially ruinous litigation costs – even if it ultimately turned out to have only 12, 13, or 14 employees. *That is precisely the scenario Congress sought to avoid.* By contrast, a jurisdictional understanding of numerosity would allow for resolution of the issue by a judge at the earliest possible juncture in the case, and would thus serve Congress' fundamental purpose of shielding small employers from the costs of litigation.

To put it simply: The *whole point* of the employee-numerosity requirement was to protect small employers from the burdens of litigation that they cannot afford. Petitioner's merits-based understanding would, in many cases, preclude early resolution of the numerosity issue and would thus routinely subject those very employers to protracted litigation. The incompatibility with Congress' clear and acknowledged intent could not be more stark.

III. Canons of Statutory Interpretation Indicate That Employee Numerosity Is Jurisdictional.

Inferences about the jurisdictional nature of Title VII's numerosity requirement may also be drawn from the nearly identical requirement in the Americans with Disabilities Act of 1990. In every relevant respect, the ADA is modeled expressly on Title VII. Like Title VII, the ADA defines the term "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year ...." 42 U.S.C. §12111(5)(A). The

ADA also explicitly incorporates Title VII's remedial scheme, including §706(f)(3)'s formal grant of jurisdiction. *See* 42 U.S.C. §12117(a). Congress' verbatim incorporation into the ADA of Title VII's numerosity and jurisdictional provisions is strong evidence of its intent that the former follow the latter, and, in fact, all here agree that the two should be read *in pari materia*.

Importantly, at the time the ADA was enacted in 1990, every federal court save one had expressly held Title VII's numerosity requirement to be jurisdictional. Specifically, the First,[4] Fifth,[5] Sixth,[6] Seventh,[7] Ninth,[8] Tenth,[9] and Eleventh[10] Circuits had all embraced a jurisdictional understanding; only the Third Circuit[11] had broken with the "orthodoxy" that "the minimum employee threshold cabined the federal courts' subject matter jurisdiction." Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. Chi. L. Rev. 1047, 1051 (2005). Given the backdrop against which Congress acted in 1990 - which also included the EEOC's then consistently held view that numerosity is jurisdictional, *see infra* at 23-25 - what this Court said in *Lorillard v. Pons* is

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[4] *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 635 (1st Cir. 1983).

[5] *See Dumas v. Town of Mount Vernon*, 612 F.2d 974, 976-77 (5th Cir. 1980).

[6] *See Armbruster v. Quinn*, 711 F.2d 1332, 1334 (6th Cir. 1983).

[7] *See Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 350 (7th Cir. 1983). The Seventh Circuit has since abandoned the jurisdictional understanding in favor of a merits-based reading. *See EEOC v. The Chicago Club*, 86 F.3d 1423, 1428-29 (7th Cir. 1996).

[8] *See Childs v. Local 18, Int'l Bhd. Of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983).

[9] *See Owens v. Rush*, 636 F.2d 283, 285-86 (10th Cir. 1980).

[10] *See McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987). Eleventh Circuit precedent on the question has since unsettled. *Compare Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1340-41 (11th Cir. 1999) (en banc) (Title VII, jurisdictional), *with Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (ADEA, merits).

[11] *See Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987).

precisely applicable: "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." 434 U.S. 575, 581 (1978). As in *Lorillard*, there is every reason here to conclude that in 1990 Congress implicitly endorsed a jurisdictional understanding of employee numerosity.

It is no answer to say that while the *Lorillard* canon may indicate that the *ADA's* numerosity requirement should be understood in jurisdictional terms, the same does not hold for *Title VII's*. First, as already noted, the statutes' definitional and jurisdiction-granting sections are identical. It would make no sense whatsoever to read them differently. Thus, inasmuch as *Lorillard* counsels a jurisdictional reading for ADA purposes, the same goes for Title VII. Second, this Court has been down this road before; its precedent shows that the ADA's incorporation of lower-court constructions of Title VII should be carried back to interpret Title VII itself. In holding in *Cannon v. University of Chicago* that Title IX entails an implied right of action, this Court looked to lower-court decisions construing Title VI in the years preceding Title IX's adoption in 1972. *See* 441 U.S. 677, 696-98 & nn.20-21 (1979). Then, in *Alexander v. Sandoval*, the Court circled back to Title VI; it took "as given" – on the basis of *Cannon's* earlier survey of lower-court Title VI precedent for the purpose of construing Title IX – that Title VI itself entails a private right of action. 532 U.S. 275, 279-80 (2001). Precisely the same mode of reasoning applies here.

IV. The Consistent Treatment of Employee Numerosity as Jurisdictional Has Validated Congress' Intent.

Through the years, both this Court and the EEOC have consistently treated the numerosity requirement as jurisdictional. To be clear, the suggestion here is *not* that this Court is bound by prior characterizations of employee numerosity as jurisdictional. These "jurisdictional rulings," if they can be called rulings at all, are most assuredly of the "drive-by"

variety, and thus have no particular "precedential effe .t." *Steel Co.*, 523 U.S. at 91. The point, instead, is that this Court and the EEOC have treated numerosity as a jurisdictional requirement *because that is how it has traditionally been understood.* And rightly so, inasmuch as it reflects Congress' considered judgment that, as a categorical matter, Title VII *does not apply at all* to employers with fewer than 15 employees.

A. This Court Has Consistently Treated Numerosity as a Jurisdictional Requirement.

1. In *EEOC v. Commercial Office Products Co.*, the Court stated straightforwardly that "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees ...." 486 U.S. 107, 119 n.5 (1988) (plurality opinion). The Government's chief response is that the statement addresses only the EEOC's "*administrative* jurisdiction[]," and "says nothing about the courts' subject matter jurisdiction, which was not at issue in the case." U.S. Br. 28. That's true, but the Government never explains why it should matter. The Third Circuit has also tried to make something of the court-agency distinction by asserting – conclusorily – that "Title VII's jurisdictional grant to the *federal courts* is broader." *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003). But is it? To be sure, the jurisdictional grant in §706(f)(3) is couched in broad terms: "Each United States district court ... shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. §2000e-5(f)(3). But so, too, is the EEOC's jurisdictional grant: "The Commission is empowered ... to prevent any person from engaging in any unlawful employment practice as set forth in ... this title." *Id.* §2000e-5(a). And why would Congress have assigned the EEOC and the courts *different* jurisdictions, given that both are integral (and integrated) parts of the same remedial scheme? The answer is that it wouldn't have. To the contrary, there is every reason to believe that what this Court said with respect to the EEOC's jurisdiction applies equally to courts' jurisdiction.

The point, in any event, is that, just like the courts, the

EEOC has (in §2000e-5(a)) a formal jurisdictional provision in Title VII. The statement in *Commercial Office* that "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees" shows that the numerosity requirement found in §701(b)'s definitional provision does indeed limit the scope of jurisdictional grants found later in the statute. And if it limits the EEOC's jurisdictional grant under in §2000e-5(a) – which does not use the term "employer" – there is no reason to think that it doesn't likewise limit the courts' grant under §706(f)(3).[12]

2. Again, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), the Court repeatedly referred to §701(b)'s definition of the term "employer" as a "jurisdictional" provision. *Id.* at 249, 251, 253.[13] But, the Government says, *Aramco* is distinguishable because (i) the question there was solely one of "legislative jurisdiction" rather than subject-matter jurisdiction, and (ii) "those are distinct inquiries." U.S. Br. 28. As for (i), it is not at all clear that *Aramco* dealt with legislative jurisdiction wholly apart from subject-matter jurisdiction. After all, as this Court itself noted, the district court there had dismissed the plaintiff's Title VII claim for lack of subject-matter jurisdiction under Rule 12(b)(1) and, *on that basis*, likewise dismissed the plaintiff's state-law claims for lack of pendent jurisdiction. *See* 499 U.S. at 247; *Boureslan v. Aramco*, 653 F. Supp. 629, 631 (S.D. Tex. 1987). This Court, having found that Title VII categorically did not apply to U.S. employers who employ U.S. citizens abroad, affirmed that subject-matter-jurisdiction dismissal. Precisely the same analysis applies here: Because Title VII categorically does not apply to employers with fewer than 15 employees, there

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[12] Notably, the Government's own brief in *Commercial Office* affirmed that "the Commission *lacks jurisdiction* under Title VII [where] the employer does not have 15 employees ...." Br. for Petitioner at 26-27, *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (No. 86-1696) (emphasis added).

[13] As in *Commercial Office*, the Court was following the EEOC's lead. *See* Br. for EEOC at 12, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (Nos. 89-1838, 89-1845) (§701's definitions are "jurisdictional provisions").

is no subject-matter jurisdiction.

As for (ii) – that legislative and subject-matter jurisdiction are entirely separate – the Government relies principally on the dissenting opinion in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 813 (1993). Without joining issue in that debate squarely, it is enough to note that the Court majority in *Hartford Fire* disagreed that only legislative, and not subject-matter, jurisdiction was at issue in that case. Rather, the Court's opinion indicates that the Sherman Act's substantial-effect-on-commerce requirement simultaneously implicates *both* legislative and subject-matter jurisdiction. *See* 509 U.S. at 796-98 & n.22.[14] Particularly given the district court's dismissal for lack of subject-matter jurisdiction – which this Court affirmed – there is every reason to think that the same was true in *Aramco*. In any event, the point, again, is that the Court in *Aramco* spoke of §701(b)'s definition of "employer" in jurisdictional terms – *i.e.*, as establishing a categorical, bright-line limit on Title VII's applicability.

3. Finally, in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), this Court dealt specifically with §701(b)'s numerosity requirement (and, more specifically still, with the proper manner of counting employees for purposes of measuring numerosity). The Government acknowledges that the lower courts had dealt with the case expressly on subject-matter jurisdiction grounds. *See* 519 U.S. at 205. The Government further acknowledges that after reversing the lower courts for failing to apply the "payroll method" of counting employees, this Court did *not* remand for a jury recount under the correct standard – as would have been appropriate were numerosity a merits issue – but instead counted employees itself. To the latter point, the Government responds that the parties there had "apparently" stipulated to "all relevant facts, leaving no fac-

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[14] *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 947-48 (7th Cir. 2003) (en banc) (so construing *Hartford Fire*); *see also McBee v. Delica, Ltd.*, 417 F.3d 107, 119-20 (1st Cir. 2005) (same, as to Lanham Act).

tual disputes for trier-of-fact to resolve on remand, regardless of whether the question was jurisdictional." U.S. Br. 27. In fact, however, this Court's opinion shows that the parties' stipulation was faulty; it "did not correspond precisely to the counting method" that the petitioners had advocated and the Court adopted. 519 U.S. at 212. In finding the facts for itself - and concluding that respondent was a Title VII "employer" - the Court thus had to go outside the parties' stipulation and make its own fresh calculation. It was justified in doing so *only* if numerosity is jurisdictional.

Given the point we are trying to make here - again, not that this Court has resolved the question presented but, rather, that this Court and the EEOC have routinely spoken of §701(b) in jurisdictional terms because that is the best understanding of it - there are two other points worth making about *Walters*. The first is simply that the EEOC's brief there (like its briefs in *Commercial Office* and *Aramco* and, as we shall see, like most all of its other documents, *see infra*) expressly referred to §701(b)'s 15-employee threshold as a "jurisdictional requirement." Brief for EEOC at 24 n.17, *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (Nos. 95-259, 95-779); *see also id.* at 6 (noting concession that under respondent's counting method "the court would lack jurisdiction"). The second is the way this Court plainly distinguished the numerosity requirement, which it called a "coverage determination," 519 U.S. at 210, from the ordinary elements of a Title VII claim. At the outset of its opinion, the Court noted that "[p]etitioners' suit rests on Title VII's antiretaliation provision, 42 U.S.C. §2000e-3(a), which makes it unlawful for an employer to discriminate against any of its employees for filing complaints of discrimination." But, the Court emphasized, contrasting the cause of action itself with the threshold numerosity issue, respondent was not "subject to Title VII" *at all* unless "it met the statutory definition of 'employer' ...." *Id.* at 205. Echoing the coverage-merits distinction that we have emphasized, *Walters* indicates that numerosity is indeed (as the EEOC itself said there) a categorical, "jurisdictional requirement."

B. The EEOC Has Consistently Treated Numerosity as a Jurisdictional Requirement.

Throughout the years - indeed, right up until its filing in this case - the EEOC has itself consistently referred, in every conceivable kind of document, to employee numerosity as a "jurisdictional" prerequisite. The EEOC's position here, therefore, is curious in that it "flatly contradicts the position which the agency had enunciated at an early date, closer to the enactment of the governing statute." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976); *see also Aramco*, 499 U.S. at 257; *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 93-94 (1973).

The EEOC has described the 15-employee threshold as a "jurisdictional" requirement not only in its briefs to this Court (*see supra* at 20, 22), but also in its compliance manual, in guidance documents, and in adjudicative decisions. The pre-2000 version of the EEOC's compliance manual devoted an entire section to the subject of "Title VII Jurisdiction." EEOC Compliance Manual, Section 605: Title VII Jurisdiction (CCH) ¶2101 *et seq.* (2000). That section states that "Title VII ... describes the types of employers ... covered by the Act" and that this is a "jurisdictional issue[]." *Id.* §605.1, ¶2102. In the same vein, the manual clearly provides that "[i]n order for the Commission to assert jurisdiction, respondent must be an employer within the meaning of §701(b) of Title VII." *Id.* §605.12, ¶2112. In answer to the question, "Does Respondent Employ 15 or More Employees?," the manual uses an example to show that "[t]he Commission would not have jurisdiction" over a charge filed against an employer that "did not employ 15 or more employees during each of 20 weeks." *Id.* §605.8(b), ¶2108. Finally, in keeping with the sharp jurisdiction-merits distinction, the manual emphasizes that "[a] determination on the jurisdictional issue will be made before a determination on the merits of the charge is made ...." *Id.* §605.1, ¶2101.[15] *See also* EEOC Compliance

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[15] Section 605 has been superseded by a new Section 2, titled "Threshold Issues." EEOC Compliance Manual, Section 2-I *et seq.* While new Section

Manual, Section 4.3(a) (titled "No jurisdiction"; "not enough employees/members" requires "jurisdiction dismissal"); *id.* §94, App. 94-A (A "charge is outside the jurisdiction of the EEOC [if] the employer ... has fewer than 15 employees.").

The EEOC's guidance documents are to the same effect. For instance, a 1990 policy guidance concerning the counting of part-time employees stated flatly that "[t]he requirement of fifteen or more employees is a jurisdictional prerequisite for Title VII coverage, while twenty or more employees is a jurisdictional prerequisite for ADEA coverage." Policy Guidance: Whether Part-Time Employees Are Employees Within the Meaning of §701(b) of Title VII and §11(b) of the ADEA, 1990 WL 1104704, at *1 (1990). In the same vein, a document issued in the wake of *Walters* offered guidance on counting employees to determine whether an employer "has a sufficient number of employees to satisfy the jurisdictional prerequisite for coverage under Title VII ...." Enforcement Guidance on *EEOC & Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997), 1997 WL 33159164, at *1 (1997); *see also id.* ("jurisdictional prerequisite for coverage"); *id.* at *2 ("jurisdictional prerequisite of 15 employees," "jurisdictional threshold[]"); *id.* at *4 ("jurisdictional prerequisite").

EEOC adjudicative decisions likewise have described numerosity as a jurisdictional requirement. *See, e.g.*, Decision No. 77-32, 1977 WL 5352, at *1 (1977) ("Respondent Employer is a retail establishment which employs more than fifteen employees and affects interstate commerce, and, as such, is subject to the jurisdiction of the Act under §701(b)."); Commission Decision on Coverage of Contraception, 2000

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2 does not use the language of "jurisdiction" specifically, it makes clear that the supersession of Section 605 (and presumably the change in terminology it entails) "does not indicate a change in Commission policy," *id.* §2-1 n.1, and it continues to differentiate sharply between coverage and merits determinations, noting that to be "covered under Title VII" *at all* an employer must have 15 employees, *id.* §2-III.B.1(a)(i), and, further, that this "threshold requirement" should be determined *"before* considering the merits of discrimination claims." *Id.* §2-I.

WL 33407187, at *1 (2000) (whether respondent is an "employer[] within the meaning of Section 701(b) of the Act" is a "jurisdictional requirement[]").

To repeat, the point is not that the EEOC is estopped from asserting its newfound position. The point is more basic: the EEOC has always understood and analyzed employee numerosity in jurisdictional terms *because that is the right way to understand and analyze it.* It squares with the real-world fact, known to all, that if an employer has fewer than 15 employees, Title VII *does not apply at all.* Employee numerosity, therefore, is, as the EEOC has repeatedly recognized, jurisdictional in the most basic sense.

V. Considerations of Sound Public Policy Counsel a Jurisdictional Understanding of Numerosity.

The numerosity requirement's jurisdictional character is confirmed by reference to the common-sense practicalities of the situation. The most salient practical point (highlighted above, *see supra* at 4-6) is that there is simply no good reason for putting off until trial the determination of numerosity, which, again, is typically an objectively verifiable, yes-or-no fact. Numerosity is, as we have said, a lose-lose proposition for a plaintiff, like Arbaugh, who sues a defendant that does not have 15 employees. Because such a defendant is "complete[ly] immun[e]" from suit, *Hishon*, 467 U.S. at 78, there is no basis for subjecting it to protracted litigation.

Arbaugh raises several policy-based arguments against treating numerosity as a jurisdictional requirement. None is persuasive – and confirmation lies in the fact that none of the problems Arbaugh imagines has ever materialized in any significant way, notwithstanding the fact that for the better part of the last quarter century most courts have held numerosity to be a jurisdictional requirement.

1. *The Incentive To Sandbag.* Arbaugh claims that a determination that the numerosity is jurisdictional will give Title VII defendants an affirmative incentive to sandbag. Defendants, she says, will hold back a known numerosity

defense, litigate the merits of the Title VII claim all the way through to conclusion with the hope of obtaining a favorable judgment with preclusive effect, and then, only if they lose on the merits, deploy the numerosity argument as a failsafe. *See* Arbaugh Br. 34-35 & n.56.

With all respect, it is worse than fantastical to think that an employer with fewer than 15 employees would have the financial wherewithal to play the games that Arbaugh imagines. We're not dealing with the *Fortune* 500 here, with fleets of high-paid lawyers scurrying around to close off every avenue. These are the "very small firms" that Congress concluded could not handle "the potentially crushing expense" of Title VII litigation in the first place. *Papa*, 166 F.3d at 940. A small employer's *only* incentive when faced with a Title VII suit is to make it go away as quickly as possible. That is not to say that there won't be cases, like this one, where a lawyer inadvertently fails to raise the issue – only that small employers have absolutely no tactical incentive to wait.

2. *Complex = Non-Jurisdictional.* Arbaugh argues that the numerosity issue "turns on complex factual issues" and, accordingly, is "inappropriate for a jurisdictional rule." Arbaugh Br. 8. There are three responses.

First, Arbaugh considerably overstates the difficulty of ascertaining numerosity. Although, as Arbaugh is quick to point out, this case required some discovery concerning the status of several workers, the typical case will require little (if anything) beyond a review of an employer's payroll records. And as Arbaugh herself acknowledges, this Court's decision in *Walters*, adopting the straightforward "payroll method" for counting employees, "somewhat simplif[ies]" the counting process. Arbaugh Br. 27. In any event, the point is that *relative to the merits issues that arise in a Title VII suit*, which as the Court knows can be quite complex, numerosity is remarkably clear-cut. As a matter of judicial economy, numerosity should be decided as early as possible in the litigation.

Second, even assuming that the numerosity inquiry may

require some analysis, Arbaugh has not explained the logical link between an issue's purported "complex[ity]" and its non-jurisdictional nature. Just last Term, this Court observed that "jurisdictional matters" are not always susceptible of easy up-or-down answers; rather, they "often necessitate judicial scrutiny." *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005). And while the Government (U.S. Br. 16) quotes *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999), for the proposition that "in most instances subject-matter jurisdiction will involve no arduous inquiry," the same decision recognizes that jurisdictional questions can be "difficult," *id.* at 577-78, 588, "formidable," *id.* at 581, and "novel," *id.* at 588; *accord Steel Co.*, 523 U.S. at 122 n.15 (Stevens, J., concurring in the judgment) ("difficult," "subtle," "complex"). Indeed, *the whole point* of both *Ruhrgas* and *Steel Co.* is that questions of subject-matter jurisdiction can be hard; those decisions determine whether difficult subject-matter jurisdiction issues may, in the interest of judicial economy, be bypassed in favor of comparatively simple personal jurisdiction or the merits inquiries.

Finally, Arbaugh never explains why, assuming the complexity she envisions, it would be preferable to let *lay juries* decide numerosity questions. If, as Arbaugh claims, it would be awkward and unwieldy for judges to have to "dig through" "pay stubs and time sheets," *Nesbit*, 347 F.3d at 83, how much more awkward and unwieldy would it be to foist that responsibility on juries? Juries exist principally to make credibility determinations and to resolve he-said-she-said conflicts; numerosity rarely if ever will turn on those sorts of judgments. *See* Mandell, *supra*, at 1064 & n.100. Accordingly, to the extent that numerosity *is* complex, it is complex in a way that carries it outside the jury's wheelhouse; institutional considerations thus counsel having judges, not juries, decide it.

3. *Sua Sponte Consideration.* Arbaugh contends that if employee numerosity is jurisdictional, courts will be obliged to inquire into the issue sua sponte but that they will "rarely have available the detailed information needed to ascertain

whether that requirement was met, or even that a problem might exist." Arbaugh Br. 32. The problem Arbaugh posits is hypothetical; it will not arise in the real world. As Arbaugh herself concedes, the problem won't come up if "one of the parties ha[s] already offered substantial relevant evidence." *Id.* at 9. And it is inconceivable that in the wake of a definitive determination that numerosity is jurisdictional, one (or both) of the parties won't do just that. After all, if numerosity is jurisdictional, then a Title VII plaintiff will have the burden, at least initially, of establishing it. *See Kokkonen*, 511 U.S. at 377. He could presumably discharge that burden – and thereby put the court on notice whether a numerosity question lurks – by attaching his EEOC charge, which, as Arbaugh herself notes, must "state the number of employees who worked for the employer." Arbaugh Br. 27 n.42 (citing 29 C.F.R. §1601.12(a)(4)). The employer defendant, of course, will have every incentive to respond with a motion to dismiss supported by pertinent documentation.

The point is that in the real world district courts will almost inevitably have some idea from the initial pleadings – and quite probably from the complaint alone – whether numerosity is at issue. They may then undertake whatever brief investigation is necessary to determine whether the 15-employee threshold has been met.

4. *The Ease of Addressing Other Issues First.* Arbaugh argues that if the numerosity issue is jurisdictional courts will be required to address it first "even though other, less difficult grounds for a decision on the merits might be evident." Arbaugh Br. 32. The implication, of course, is that courts shouldn't be put to the trouble. But that, with respect, is just an argument for not taking *Steel Co.* seriously. *Steel Co.* teaches that if an issue is jurisdictional, it must be dealt with first, even if simpler issues are in the offing. The logic doesn't run in the other direction – that if simpler solutions are available, an issue should be deemed non-jurisdictional.

In any event, the benefit that Arbaugh suggests – being able to bypass numerosity to resolve the case on some easier

ground - is illusory. The benefit of reclassifying numerosity as a merits issue would be real only where some substantive element of the Title VII claim were *obviously and plainly* lacking. But, again, the merits questions in a typical Title VII case - Was this "discrimination"? Was it "because of" sex? - are notoriously fact-intensive. None is likely to be particularly straightforward in the sense Arbaugh imagines. Indeed, the only example that Arbaugh musters - of determining "whether an administrative charge had been filed within the applicable deadline following the alleged discriminatory act" (Arbaugh Br. 33) - would not have saved an ounce of judicial effort in this case; there was never a question whether Arbaugh's EEOC charge was timely. The point is that even if numerosity were a merits question, a court would almost inevitably have to confront it eventually. *See* Mandell, *supra*, at 1071-72.

5. *Burdening State Courts with Federal Rules.* Arbaugh asserts that if numerosity is truly jurisdictional, then it is jurisdictional with respect to Title VII claims brought in state courts, as well, and, therefore, that "state courts hearing Title VII claims would themselves have to follow in this regard the often wasteful and burdensome procedures applicable to federal jurisdictional rules." Arbaugh Br. 26. Arbaugh cites no support for that proposition and, with respect, she is simply wrong about it. The "wasteful and burdensome procedures" to which Arbaugh presumably refers - *Steel Co.*, sua sponte consideration, etc. - all result directly from the uniqueness of *federal* courts as courts of limited jurisdiction. *See Steel Co.*, 523 U.S. at 94-95; 13 Wright & Miller, *supra*, §3522, at 69-72. By contrast, "[m]ost state courts are courts of general jurisdiction ...." *Id.* §3522, at 60. Accordingly, the rationale underlying the rules to which Arbaugh objects simply doesn't apply in state courts. A state court faced with a numerosity-based "jurisdictional" issue, therefore, can approach and dispose of it however it wants, in accordance with applicable state procedural rules. It may, of course, choose to raise it sua sponte and address it first in the manner of *Steel Co.* But it is by no means *obliged* to do so.

6. *The Specter of Strategic Firings.* The Government floats one last policy argument for treating numerosity as an ordinary merits issue. If, it says, numerosity is jurisdictional, then it will need to be measured at the time the suit is filed, rather than when the challenged conduct allegedly occurred. And from that state of affairs, the argument goes, small employers will derive an incentive to "eliminate potential liabilities simply by reducing their workforce" – *i.e.*, by firing workers in order to squeeze in under the 15-employee threshold. U.S. Br. 19.

The argument is far-fetched. It requires one to assume that an employer would, on the heels of what might (or might not) constitute actionable behavior, fire an employee (or two, or five) solely in order to stave off a potential, as-yet-unfiled Title VII suit – leaving itself subject, all the while, to suit under state law, which Arbaugh herself emphasizes is often more plaintiff-friendly anyway. *See* Arbaugh Br. 36 (state-law causes of action are typically not "dependent on a showing that the employer has fifteen employees" and "frequently provide[] more expansive remedies, involve[] less demanding standards of proof, or impose[] less stringent procedural barriers"). It is inconceivable that any rational small employer would fire even one employee – and thus subvert its entire business model – in order to achieve so Pyrrhic a victory.

7. *Other Remedies.* Finally, and relatedly, there can be no argument here that if the Court reaffirms the numerosity requirement's jurisdictional character, employees will be left out in the cold. As Arbaugh herself has emphasized, "thirty-five states and the District of Columbia have enacted anti-discrimination laws applicable to" employers with fewer than 15 employees, and "the conduct giving rise to a Title VII claim" will often "constitute a tort under state law." Arbaugh Br. 36. And as just noted, these state-law remedies are frequently more favorable to plaintiffs than Title VII.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,
D/B/A THE MOONLIGHT CAFE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 04-944

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,
D/B/A THE MOONLIGHT CAFE,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF AMICI CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or

It represents an underlying membership of more than three million businesses and organizations in every industrial sector and geographic region of the country.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation")—a nonprofit public interest law firm established to protect the rights of America's small business owners—is the legal arm of the National Federation of Independent Business ("NFIB"), the Nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, the Society's mission is to serve the needs of human resource ("HR") professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

The resolution of the issue presented in this case will have a direct impact on hundreds of thousands of members of the Chamber, the NFIB, and the SHRM. The smallest of small businesses—those with 15 or fewer employees—include mom and pop stores, dry cleaners, landscaping companies,

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submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

barbershops, beauty salons, car washes, restaurants, and family farms, and Congress sought to categorically exempt such small concerns from Title VII regulation.[2]

Amici have collectively participated as *amici curiae* in many cases before this Court, including cases relating to the federal antidiscrimination laws and affecting the interests of small business owners. *See, e.g.*, *Ballard* v. *Commissioner*, 125 S. Ct. 1270 (2005); *McNab* v. *United States*, 540 U.S. 1177 (2004); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997).

SUMMARY OF ARGUMENT

This case asks whether Congress intended federal courts to exercise jurisdiction over Title VII claims against the smallest of employers—those who employ fewer than fifteen employees. The answer is no; Title VII's numerosity requirement is jurisdictional.

Congress may define through statute the boundaries of federal court jurisdiction. All of the parties to this case agree on that. The parties also agree that Congress has often acted to limit a federal court's jurisdiction to hear and enforce federal claims, and that jurisdictional limitations manifest themselves in a variety of ways. Title VII's numerosity requirement—which restricts the statute's definition of "employer" to those entities with fifteen or more employees—is one such jurisdictional limitation. The text of the statute supports the conclusion that the numerosity requirement is jurisdictional. Title VII's ample legislative history, which contains multiple

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[2] "Small businesses" are frequently defined as having fewer than 500 employees. *See, e.g.*, United States Small Business Administration, Office of Advocacy, Frequently Asked Questions (Oct. 2005), *available at* http://www.sba.gov/advo/stats/sbfaq.pdf. The term is used in this brief, however, to describe the subset of businesses with fewer than 15 employees.

references to legislators' concerns about the great burdens on small employers if they were to be subjected to Title VII lawsuits, bears out that conclusion. And this Court's case law—including two cases in which the Court addressed Title VII numerosity issues that had led to dismissals *for lack of jurisdiction* below—substantiates that conclusion as well.

At a practical level, it makes plain sense that the numerosity requirement is jurisdictional. Many of the smallest companies—those on Title VII's numerosity "bubble"—live on the financial edge. They have little capital available to defend a costly federal discrimination lawsuit, and they have no legion of attorneys, in-house or otherwise, at their immediate command. Finding Title VII's numerosity requirement to be jurisdictional grants such companies the deserved opportunity to secure dismissal from a Title VII case at the earliest possible stage—before costly discovery, summary judgment motions, or trial—as well as the flexibility to seek and receive dismissal on jurisdictional grounds at a later stage of the proceedings if the numerosity issue manifests itself only then. And from the perspective of the Title VII plaintiff, deeming the requirement jurisdictional does not alter the outcome: if a plaintiff sues a company that does not employ fifteen employees, and thus is not deemed an "employer" under the Act, that plaintiff loses. Whether that plaintiff loses early—at a threshold, jurisdictional stage—or late, the result to the plaintiff is the same. The legislature intended to immunize small employers from Title VII suits when it set the statute's numerosity limit, and that limit should be given the significance Congress intended it to have.

All of the legal and practical inquiries therefore point the same way in this case: the Court should conclude that Title VII's numerosity requirement is jurisdictional.

ARGUMENT

I. CONGRESS HAS, AND REGULARLY EXERCISES, BROAD AUTHORITY TO LIMIT THE JURISDICTION OF THE FEDERAL COURTS.

The Constitution authorizes Congress to limit the subject matter jurisdiction of the federal courts as it sees fit. U.S. Const. art. I, § 8, cl. 9. "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). As far back as 1807, Chief Justice Marshall explained that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); *see also Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (federal court jurisdiction can exist only if the Constitution permits it and an act of Congress supplies it). Congress thus controls if or when federal courts obtain subject matter jurisdiction over a dispute.

Congress has many times exercised its authority to limit the jurisdiction of the federal courts, and petitioner specifically acknowledges as much. Pet. Br. 20 & nn.25-30, 22-23 & nn.32-37 (citing multiple statutes imposing jurisdictional limits based on, *inter alia*, exhaustion, mediation, and amount-in-controversy requirements). The Solicitor General's amicus submission likewise recognizes that Congress has imposed jurisdictional limits in a multitude of statutes, including the admiralty statute, 46 U.S.C. App. § 740 (jurisdiction only when "a vessel" in "navigable water" is the "proximate cause" of alleged harm), *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 541 (1995); the Federal Tort Claims Act (jurisdiction only when the United States waived immunity and administrative claim was filed with appropriate government agency), *FDIC* v.

Meyer, 510 U.S. 471 (1994); 28 U.S.C. § 1343, providing for redress of the deprivation of federal rights under color of state law (jurisdiction only if a statutory action has been alleged, as held in *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278-279 (1977)); and the Foreign Sovereign Immunities Act (jurisdiction only when facts meet specific immunity exception); and 28 U.S.C. § 1332 (jurisdiction only when parties are citizens of different states). *See* U.S. Br. 12, 22.

Additional examples abound—including, importantly, many statutes where a jurisdictional prerequisite exists elsewhere than the provision spelling out a federal court's enforcement authority. For instance, a court must determine whether an employee benefits plan meets the statutory definition of an "employee welfare benefit plan" governed by ERISA before it may exercise jurisdiction over an ERISA claim. *See, e.g.*, *Gualandi* v. *Adams*, 385 F.3d 236, 239 (2d Cir. 2004); *Xaros* v. *U.S. Fid. & Guar. Co.*, 820 F.2d 1176 (11th Cir. 1987). ERISA Section 1003(b) specifies that the statute does not apply to certain employee benefit plans, including governmental or church plans. ERISA's broad civil enforcement section itself, however, does not contain that limitation. *See* 29 U.S.C. § 1132. Nonetheless, courts recognize that if a plan is not a covered "employee welfare benefit plan" within the scope of Section 1003, they have no jurisdiction to adjudicate an alleged ERISA violation.

Another example appears in the antitrust laws. A defendant's conduct must have a "direct, substantial, and reasonably foreseeable effect" on interstate commerce before a federal court may exercise jurisdiction over a Sherman Act claim. 15 U.S.C. § 6a; *see, e.g.*, *United Phosphorous, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 945-952 (7th Cir.) (en banc), *cert. denied*, 540 U.S. 1003 (2003); *Save Our Cemeteries, Inc.* v. *Archdiocese of New Orleans*, 568 F.2d 1074 (5th Cir. 1978); *Diversified Brokerage Servs., Inc.* v. *Greater Des Moines Bd. of Realtors*, 521 F.2d 1343 (8th Cir. 1975).

Similarly to Title VII, the Sherman Act's jurisdictional provision is framed quite broadly: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title." 15 U.S.C. § 4. But, as with the interplay between provisions of the ERISA statute, another provision of the Sherman Act—here Section 6(a)—circumscribes a federal court's jurisdictional authority.

A third example appears in the copyright laws. The jurisdictional grant to federal courts—found in 28 U.S.C. § 1338—broadly states that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to * * * copyrights * * *." Another statutory provision, however, limits that broad jurisdictional grant. In 17 U.S.C. § 411(a), Congress limited the actions that can be adjudicated in federal court to those involving *registered* copyrights, even though "registration is not a condition of copyright protection." 17 U.S.C. § 408(a). An owner of an unregistered copyright may still suffer infringement, but it is not infringement that a district court has subject matter jurisdiction to adjudicate. *See La Resolana Architects, PA* v. *Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-01 (10th Cir. 2005).

The sheer breadth and number of statutes in which Congress has limited jurisdiction—and the tremendous variety of ways in which Congress has limited jurisdiction in other statutory contexts—provide the necessary backdrop for the conclusion here: Title VII's numerosity requirement, like the (often fact-based) jurisdictional requirements in many other statutes, similarly limits federal court jurisdiction.

II. CONGRESS INTENDED TITLE VII'S EMPLOYEE NUMEROSITY REQUIREMENT TO OPERATE AS A JURISDICTIONAL LIMITATION.

1. The Court may and should begin with a straightforward reading of the statute itself. The statutory language at issue in Title VII, including its definition of "employer," is that of limitation and exclusion. 42 U.S.C. § 2000e(b). The Act prohibits unlawful employment practices *by an employer*—no other—and specifically defines those considered to be "employees" under the statute. 42 U.S.C. § 2000e-2; *see also id.* § 2000e-3(a), (b). If an entity is not an "employer," then there is no claim for a federal court to adjudicate. Yet under petitioner's proffered jurisdictional reading, a court would have jurisdiction over any Title VII claim no matter how unlike an "employer" the defendant entity was. *Compare Woodard* v. *Virginia Bd. of Bar Examiners*, 598 F.2d 1345, 1346 (4th Cir. 1979) (no subject matter jurisdiction over Title VII discrimination claim against Virginia Board of Bar Examiners brought by student sitting for exam).

2. The legislative history of Title VII and the 1972 amendments to the Act confirm that Congress viewed the numerosity requirement as a fundamental limitation on the jurisdiction of the federal courts to entertain employment disputes. Title VII was enacted against a backdrop of the civil rights conflicts of the 1960s—including, importantly, fear of "the steady and deeper intrusion of the Federal power in fields where the problem is essentially State and local in character." 110 Cong. Rec. 8193 (Apr. 16, 1964) (Sen. Dirksen), cited in *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 116 (1988). In determining which employers would be categorically excluded from the Act—*i.e.*, where to draw the line beyond which "the Federal power" would not intrude on businesses' employment practices—Congress focused on two concerns: protecting small businesses from the financial burdens associated with regulation under the

Act, and avoiding encroachment on the relationship between a small business owner and his or her employees.

Members of Congress expressed grave concerns that including small businesses within Title VII's ambit would impose costs—both administrative and related to litigation—that small companies could and should not reasonably be forced to bear. *See, e.g.*, 110 Cong. Rec. 2708, 2711, 2712 (Feb. 10, 1964), 9594 (Apr. 29, 1964), 13087, 13092 (June 9, 1964); 118 Cong. Rec. 2388-90, 2391-94, 2409-11 (Feb. 2, 1972); Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., Legislative History of the Equal Employment Act of 1972, at 1010, 1375. As one Senator observed, "[H]ow many of these little fellows in business are able to get to court? Most of them cannot afford to pay the court cost, let alone the legal fees that would be necessary" to defend against a federal discrimination claim. 110 Cong. Rec. at 2711 (Sen. Rogers). Another emphasized that small businesses are "without the assets and capability to cope with the legal and administrative tangle" the Act would "thrust upon them." 118 Cong. Rec. 2389 (Sen. Stennis). *See also Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) ("Congress decided to protect small employers 'in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.' ") (quoting *Miller* v. *Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)).

Members of Congress also expressed concern that including small businesses in Title VII would too deeply intrude into the culture of small businesses. Senator Fulbright, for example, observed that "[t]he matter of selection of employees goes to the very heart of the success of a small business * * *." 110 Cong. Rec. 9594 (Sen. Fulbright) (Apr. 29, 1964). *See also id.* at 13085 (Sen. Cotton) ("[W]hen a small businessman * * * selects an employee, he comes very close to selecting a partner * * *."); *id.* at 13088 (June 9, 1964); Sen. Subcomm. on Labor of the Comm. on Labor and Public

Welfare, 92d Cong., Legislative History of the Equal Employment Act of 1972, at 1010 (small business associates are in "almost a family relationship"); *id.* at 1283, 1375.

The extensive discussion preceding the initial passage of Title VII, including the repeated airing of the legislators' intent that small businesses be insulated from Title VII claims against them, was reprised in the 1972 Amendments to the Act. 118 Cong. Rec. 2388-94, 2409-11 (Feb. 2, 1972); Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., Legislative History of the Equal Employment Act of 1972, at 1010, 1283, 1375. Those amendments, among other things, lowered the numerosity requirement from 25 to 15. The Report accompanying the amendments specifically describes the change to the numerosity requirement as "*changing the jurisdictional reach of Title VII.*" H.R. Rep. No. 92-238, at 20 (1971) (emphasis added). Congress plainly did not intend to subject small employers to Title VII enforcement and liability, and in sparing them the financial and other burdens related to that federal regulation, did not provide federal courts with adjudicative authority over these employers.

Congress amended Title VII again in 1991. *See* P.L. 102-166, 105 Stat. 1071 at §§ 2, 3. By that time, the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits *all* had held that Title VII's numerosity requirement was jurisdictional.[3] Congress is presumed to be aware of those cases.

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[3] *See Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 635 (1st Cir. 1983); *Woodard*, 598 F.2d at 1346; *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 976-977 (5th Cir. 1980); *Armbruster* v. *Quinn*, 711 F.2d 1332, 1334 (6th Cir. 1983); *Hassell* v. *Harmon Foods, Inc.*, 454 F.2d 199, 199 (6th Cir. 1972); *Zimmerman* v. *North Am. Signal Co.*, 704 F.2d 347, 350 (7th Cir. 1983); *Childs* v. *Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Owens* v. *Rush*, 636 F.2d 283, 285-286 (10th Cir. 1980); *McKenzie* v. *Davenport-Harris Funeral Home*, 834 F.2d

Cannon v. *University of Chicago*, 441 U.S. 677, 697 (1979) (the Court is "especially justified in presuming" that Congress is aware of judicial interpretations of an existing statute and adopts that interpretation when it enacts a new statute patterned after the existing one); *see also Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). Congress's failure to indicate any contrary idea about the jurisdictional limits of the Title VII statute in its substantial 1991 amendments speaks volumes.[4]

Congress thus plainly was motivated in Title VII and in the later rounds of amendments to the statute to protect and preserve small employers' financial and associational interests. And Congress advanced that firmly stated purpose by expressly exempting those employers from Title VII scrutiny. The most natural reading of the statute coupled with its legislative history is that the exemption Congress crafted for

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930, 932-933 (11th Cir. 1987). Only the Third Circuit had ruled that the numerosity issue went to the merits. *See Martin* v. *United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987).

More recently, the Seventh Circuit abandoned its earlier view in favor of a merits-based reading. *See EEOC* v. *The Chicago Club*, 86 F.3d 1423, 1428-29 (7th Cir. 1996). And the Eleventh Circuit has issued conflicting opinions. *Compare Lyes* v. *City of Riviera Beach*, 166 F.3d 1332, 1340-41 (11th Cir. 1999) (en banc) (Title VII numerosity requirement is jurisdictional), *with Garcia* v. *Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (ADEA numerosity requirement is part of merits).

[4] Also against this backdrop, Congress included a nearly identical numerosity requirement in the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) in 1990, and incorporated Title VII's remedial scheme, including the formal grant of federal-court jurisdiction in § 706(f)(3). *See* 42 U.S.C. §12117(a). Congress similarly described the effect of the Family Medical Leave Act's nearly identical numerosity requirement as "exempti[ng] * * * employers" below the requirement. H.R. Rep. 101-28, Part 1, at 24 (1989).

small businesses goes to the jurisdiction of the courts. For construing the numerosity issue as a jurisdictional prerequisite—not an element of a plaintiff's proof on the merits—confers on small businesses the opportunity to exit litigation early if no jurisdictional basis for the suit exists, and in addition (as is the situation here) the opportunity to obtain dismissal on jurisdictional grounds at a later stage. Reading Title VII to afford small employers opportunities for early dismissal from litigation, as well as the flexibility to raise the jurisdictional issue later if necessary, best comports with the legislators' desire to thoroughly and effectively insulate small businesses from the burdens of defending federal discrimination lawsuits. *See* Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. Chi. L. Rev. 1047, 1064 (2005) ("A reading of Congress's intent as the protection of small business from federal regulation is consistent with interpreting the minimum employee threshold as establishing a jurisdictional prerequisite.").

3. It is also telling that Congress in the 1972 Amendments to Title VII viewed the change in the statute's definition of "employer"—dropping the numerosity requirement from 25 to 15—as expanding the *EEOC's* jurisdiction over Title VII discrimination claims. *See, e.g.*, S. Rep. No. 92-415, at 8-9 (1971); H. Rep. No. 92-238, at 1 (amendments would "broaden jurisdictional coverage"); *id.* at 64 ("if [EEOC] jurisdiction is thus extended"); *id.* at 70 (bill "expands the jurisdiction of the EEOC"). Given that a civil action can only follow an EEOC charge, 42 U.S.C. § 2000e-5(f)(2), the EEOC's jurisdiction to prevent unlawful employment practices is directly relevant to whether the federal courts in turn have jurisdiction over a civil action arising out of the EEOC charge.

The EEOC and this Court have both stated that the EEOC's jurisdiction to investigate complaints is limited to employers with greater than 15 employees. *See, e.g.*, *EEOC* v. *Com-*

mercial Office Prods. Co., 486 U.S. at 119 n.5 ("Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees * * *.") (citing 42 U.S.C. § 2000e(b)); EEOC Decision No. 77-32, 1977 WL 5352, at *1 (Aug. 16, 1977) (EEOC has jurisdiction because respondent "employs more than fifteen employees and affects interstate commerce").[5] The EEOC's jurisdiction plainly should be viewed as coextensive with the jurisdiction of the federal courts. It simply would make no sense for Congress to confer on the federal courts greater jurisdiction to hear discrimination claims than the jurisdiction of the EEOC—the required first stop for all Title VII litigants.

III. THIS COURT'S PRECEDENTS SUPPORT THE CONCLUSION THAT TITLE VII'S EMPLOYEE NUMEROSITY REQUIREMENT IS A JURISDICTIONAL LIMITATION.

This Court has heard and resolved two separate cases in which a Title VII claim came before the Court after having been dismissed for lack of subject matter jurisdiction. And the Court resolved each without so much as raising an eyebrow on the jurisdictional issue. Although the Court did not directly address the jurisdictional issue presented here in either of those cases, "weighty inferences" are appropriately

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[5] *See also, e.g., Auld* v. *Law Offices of Cooper, Beckman & Tuerk*, 1992 WL 372949, at 1 (4th Cir. Dec. 18, 1992) (EEOC "denied jurisdiction because it found that [defendant] possessed fewer than 15 employees during the relevant time period."); *Mochelle* v. *J. Walter Inc.*, 823 F. Supp. 1302, 1307 (M.D. La. 1993) (EEOC found "no jurisdiction to hear the plaintiff's ADEA complaint because [defendant] did not have the requisite 20 employees required by 29 U.S.C. § 630(b)."), *aff'd*, 15 F.3d 1079 (5th Cir. 1994); *Fike* v. *Gold Kist, Inc.*, 514 F. Supp. 722, 725 (N.D. Ala.) (EEOC dismissed charge "for lack of jurisdiction" because defendant "did not have 15 or more employees."), *aff'd*, 664 F.2d 295 (11th Cir. 1981).

drawn from both decisions. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 396 (1982).

In *Walters* v. *Metropolitan Educational Enterprises*, 519 U.S. 202 (1997), the district court dismissed a Title VII complaint *for lack of subject matter jurisdiction* because the employer did not satisfy the numerosity requirement. The Seventh Circuit affirmed. The Supreme Court granted certiorari to determine the meaning of the phrase "has fifteen or more employees for each working day in each of twenty or more weeks": Did an employer have an employee for any working day in which the employee maintains an employment relationship with the employer, or only on those days for which the employee received compensation from the employer? *Id.* at 204. The Court held the former, adopting what is known as the "payroll method" of determining how many employees an employer had. *Id.* at 207.

For present purposes, the Court's approach to the issue is more significant than its holding. The Court examined payroll receipts and other evidence in the record to determine the number of employees, ruled that the defendant was in fact an employer, and remanded the case for further proceedings. *Id.* at 212; *see also id.* at 205 (holding that "Metropolitan was subject to Title VII, however, only if, at the time of the alleged retaliation, it met the statutory definition of 'employer' "). Once the Court adopted the "payroll method" for counting employees, of course, it could have remanded the case to let the jury decide if the defendant was an "employer." But it did not; instead it undertook and resolved that threshold inquiry itself. The Court's approach therefore is consistent with the view that determining the number of employees is a threshold jurisdictional question appropriately resolved by a judge, not a substantive element to be decided by a jury. And of course, had the Court perceived the numerosity issue to involve one of the substantive elements of Title VII, it might have reversed the dismissal for lack of

jurisdiction on that basis—not because it found the defendant was an employer.

EEOC v. *Arabian American Oil Company*, 499 U.S. 244 (1991) (*Aramco*), similarly arrived at the Court after a district court dismissed the plaintiff's Title VII claim for lack of jurisdiction and the state law claims for lack of pendant jurisdiction. *Id.* at 247. The EEOC argued in this Court that "Title VII's 'broad jurisdictional language' reveals Congress' intent to extend the statute's protections to employment discrimination anywhere in the world." *Id.* at 249. This Court rejected that notion, and its rationale is telling. The Court looked to Title VII's definitional section—in particular, to the definition of "employer"—and concluded that Congress did not intend the EEOC's jurisdiction to extend to employers operating abroad. *Id.* at 252. The *Aramco* Court did not treat the statute's definition of "employer" as an element of a Title VII claim relevant only to the merits of the case; quite to the contrary, the definition formed a critical aspect of its jurisdictional inquiry.[6]

Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), on which petitioner and the United States so heavily rely, is not contrary to amici's position. *Zipes* examined whether the timely filing of an EEOC charge is a jurisdictional prerequisite, as opposed to a statute of limitations subject to waiver and estoppel. *Id.* at 392-393. The Court found the timely filing requirement non-jurisdictional for reasons particular to that case and that requirement. First, the legislative history of the timeliness requirement indicated that Congress viewed it as a statute of limitations. *Id.* at 394. Second, Congress modeled the timeliness requirement on the National Labor Relations Act, which contains a statute of limitations for

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[6] The holding in *Aramco* was superseded by statute. *See* Pub. L. 102-166, 105 Stat. 1071, § 109(a) (adding provisions relating to employment in a foreign country, currently codified at 42 U.S.C. § 2000e(f)).

filing a charge rather than a jurisdictional restriction. *Id.* at 395 n.11. And third, Congress previously had stated that the EEOC filing requirement in the Age Discrimination in Employment Act—which in turn was modeled on Title VII's requirement—was "not a jurisdictional prerequisite" and was subject to "equitable modification." *Id.*

Here, as shown above, congressional intent cuts just the opposite way, and supports a finding that the numerosity requirement is a categorical exemption for small employers that prevents a district court from taking jurisdiction over a Title VII case against them.

IV. PRACTICAL CONSIDERATIONS SUPPORT CONGRESS'S DECISION TO MAKE NUMEROSITY A JURISDICTIONAL LIMITATION.

1. It makes good sense to determine numerosity at the outset of Title VII litigation. Small businesses face unique and substantial challenges in defending federal discrimination lawsuits. Many small businesses on the Title VII numerosity "bubble" are truly hand-to-mouth operations; indeed, seven out of ten small business owners start their business with precious little capital—just over $18,000. William J. Dennis, Jr., *Business Starts and Stops*, Wells Fargo/NFIB Series on NFIB Education Foundation, at 3 (Nov. 1999), *available at* http://www.nfib.com/attach/2429. Compare that start-up money to the "average cost of defending an employment discrimination suit, from the EEOC investigation process through litigation," which "is estimated to be $130,000." Steven A. Brehm, *Note, Does* EEOC v. Frank's Nursery & Crafts, Inc. *Create an End Run Around Arbitration Agreements?: Whether an Employee's Binding Arbitration Agreement Precludes the EEOC from Seeking Back Pay and Damages on Behalf of the Employee*, 39 Brandeis L.J. 693, 696 (2001); *see also* Aimee Gourlay & Jenell Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving*

Disputes, 21 Hamline L. Rev. 261, 286 (1998) ("the cost of taking a discrimination case from complaint to trial in California often reaches $300,000"). For a small enterprise, such a massive outlay—potentially hundreds of thousands of dollars to defend one case—threatens the business's very financial viability.

It also should go almost without saying that small businesses have far less access to legal resources than large employers equipped with a full complement of in-house counsel—not to mention outside counsel at their beck and call. Lacking ample legal resources, many small businesses are left to their own devices when navigating complex federal regulatory requirements and proscriptions. Many small business owners "report that it can take 40 or more hours to understand whether any given regulation applies to them." NFIB, *Small Business Problems & Priorities* at 6 (June 2004), *available at* http://www.nfib.com/attach/6155. NFIB also has found that it costs business owners with fewer than 20 employees "about 60 percent *more* per employee in [federal regulatory] compliance costs than experienced by larger firms." *Id.* at 9 (emphasis added). A similar recent study funded by the United States Small Business Administration found the same disproportionate impact. *See* W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (Sept. 2005) (concluding that it costs about 45 percent more for small firms to comply with federal regulations than their larger counterparts), *available at* http://www.sba.gov/advo/research/rs264.pdf. An earlier study conducted by the Small Business Administration in 2001, which had used a slightly different methodology, concluded that the disproportionality rate was even higher—nearly 60 percent. *Id.*; *see also* United States Small Business Administration, Office of Advocacy, Press Release: Small Business Hard Hit By Federal Regulatory Compliance Burden, New Study Shows Smallest Firms Bear Largest Per Employee Burden (Sept. 19, 2005) (noting that the 2005 study updated two earlier reports from 1995 and 2001, both of which also "showed similar patterns of

disproportionate regulatory burden borne by small businesses"), *available at* http://www.sba.gov/advo/press/05-43.html.

It therefore is plainly in a small employer's interest to have questions about its susceptibility to a Title VII suit decided at the threshold of federal litigation, thereby avoiding what might otherwise be protracted involvement in a lawsuit and its attendant legal and other costs. Treating numerosity as a jurisdictional factor serves this important purpose. It permits a court to inquire at the earliest possible stage into its jurisdiction over a Title VII dispute against a small employer and to terminate that litigation right then, without further ado, if the numerosity requirement is not met. And the numerosity question is not a messy qualitative inquiry: it is a simple, quantitative analysis, fully suitable for resolution before full-blown discovery and without empanelling a jury. *See Grubart*, 513 U.S. at 537-538 ("any litigation of a contested subject-matter jurisdiction fact issue [can] occur[] in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection)").

The alternative—a finding, as petitioner and the United States urge, that numerosity is relevant only to the merits of a Title VII claim—will subject small employers to extensive litigation and discovery on each and every facet of a case before the employers may be able to extricate themselves from litigation on the simple ground that they are not within the statute's reach. If numerosity is an element of plaintiff's proof rather than jurisdictional, and if some dispute exists over whether a small business satisfies that requirement, a judge alone may not preliminarily decide the issue.[7] Rather,

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[7] If the numerosity requirement is jurisdictional, a court resolving that issue need not assume that a plaintiff's allegations as to the number of employees are true; it may permissibly inquire into the

any factual disputes relating to the number or kind of a small business's employees will be sent to a jury with the rest of the case—far later in the process, of course, than would otherwise apply if the requirement were a jurisdictional prerequisite. The very businesses who least can afford to litigate thus will expend more resources litigating, and will potentially be forced to litigate claims for far longer, than if the numerosity requirement were broached and resolved at the threshold of the suit.

2. Deeming the numerosity requirement to be a jurisdictional limit serves other important practical purposes as well. If the numerosity requirement is jurisdictional, Title VII plaintiffs will bear the burden of pleading that jurisdictional fact at the very outset of the litigation. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) ("[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.' ") (citations omitted). That threshold obligation will put small businesses sued under Title VII—many of whom, as earlier noted, may not be intimately or even superficially familiar with the statute's requirements—on notice that the number of employees is critical to whether the court may even hear the plaintiff's claims. Compare that to this case, where the petitioner simply pleaded that federal jurisdiction existed

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facts without viewing the evidence in a light favorable to either party. *See Nesbit* v. *Gears Unlimited, Inc.*, 347 F.3d 72, 77 (3d Cir. 2003). But if the inquiry is wrapped up with the merits, a plaintiff could survive a motion to dismiss—and thereby force a small employer to suffer the financial expense of full-blown discovery and a round of summary judgment motions—simply by alleging that there are more than 15 employees. *Id.* And even at the summary judgment stage, the court would have to view the evidence in the light most favorable to the plaintiff, causing a small employer to further endure the financial costs of a full-blown trial. *Id.*

without any reference to the number of respondent's employees.

3. Petitioner and the United States have raised various practical concerns that they argue counsel against finding that Title VII's numerosity requirement is jurisdictional. Some of their concerns are exaggerated; others simply are wrong.

a. Petitioner argues that Title VII's merits issues may sometimes be more easily resolved than the threshold numerosity issue. *See* Pet. Br. 32; *see also* U.S. Br. 17. That argument has two flaws, one factual and one legal. First, in most cases, the jurisdictional determination whether the numerosity requirement is met will be straightforward.[8] The vast majority of employers either clearly have or clearly lack 15 employees—making limited fact-finding and discovery on numerosity the exception, not the rule. The number of employees is an objectively verifiable fact.

Second, that a Title VII merits inquiry may appear "more easily" resolved, U.S. Br. 17, cannot confer federal jurisdiction where it does not exist. As this Court made clear in *Steel Company* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), a court may not "assume" jurisdiction to reach and resolve the merits of a case. To do so "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94. The requirement that jurisdiction be established as a threshold matter before turning to the merits of a case " 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without excep-

[8] The merits of a Title VII case also are rarely as straightforward as the petitioner and the Solicitor General suggest. A Title VII merits case generally involves the well-known and often complex *McDonnell Douglas* burden-shifting analysis, not to mention multiple credibility determinations. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

tion.' " *Id.* (quoting *Mansfield, C.&L.M.R. Co.* v. *Swan*, 111 U.S. 379, 382 (1884)).

It also is in no way unique to Title VII that a case may occasionally require factfinding to determine whether the facts necessary to support jurisdiction exist. Other jurisdictional factors created by Congress also entail factfinding in certain cases—which is why the Courts of Appeals have unanimously concluded that it is proper to permit the limited discovery necessary to resolve such narrow factual questions. *See* Stefania A. Di Trolio, *Comments, Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 Seton Hall L. Rev. 1247, 1257-58 & n.80 (2003) (citing cases). This is true across the board, no matter what sort of jurisdictional fact is in dispute. *See, e.g.*, *Gualandi*, 385 F.3d at 244 (ERISA); *Laub* v. *United States Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (standing under National Environmental Policy Act); *Cirino-Encarnacion* v. *Concilio De Salud Integral De Loiza, Inc.* 317 F.3d 69, 70 (1st Cir. 2003) (Emergency Medical Treatment and Active Labor Act and the Federal Tort Claims Act); *Valentin* v. *Hospital Bella Vista*, 254 F.3d 358, 363-364 (1st Cir. 2001) (diversity jurisdiction); *Goodman Holdings* v. *Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994) (Foreign Sovereign Immunity Act); *see also Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 351 n.12 (1978) (noting the availability of discovery to ascertain jurisdictional facts) (citing 4 J. Moore, Federal Practice ¶ 26.56 [6] (2d ed. 1976); *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947) (court may inquire into jurisdictional facts whenever and however necessary); *Note, The Use of Discovery to Obtain Jurisdictional Facts*, 59 Va. L. Rev. 533 (1973)).[9] As these cases and numerous others like them demonstrate, that a particular fact may require preliminary discovery in no way

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[9] The availability of limited jurisdictional discovery resolves petitioner's concern that a Title VII plaintiff may not have access to numerosity information before filing suit. Pet. Br. 27.

answers whether Congress intended that that factual dispute bear on jurisdiction or the merits.

b. Petitioner's and the government's second practical concern with deeming the numerosity requirement jurisdictional—that small-business defendants in Title VII cases have an incentive to "sandbag" plaintiffs by waiting until after trial to raise a jurisdictional defense—simply is not realistic. Pet. Br. 34; U.S. Br. 18. There is *no* incentive—none—for a small employer to wait to raise a jurisdictional defense. Small businesses have *every* incentive, including and especially a financial one, to curtail Title VII litigation at the earliest possible stage. A small business therefore will challenge numerosity at the earliest opportunity, except in the most unusual circumstances (such as where, as here, it is not apparent to the company at the pleading stage that it may not meet the numerosity requirement). And even the anomalous situation in which numerosity is not challenged at the first opportunity does not change the analysis. "The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

c. The Solicitor General also suggests that if the numerosity requirement is jurisdictional, employers may fire employees to avoid Title VII litigation. That also is a hypothetical disconnected from reality. *See* U.S. Br. 19. The majority of circuits have viewed Title VII's numerosity requirement as jurisdictional for *decades*. *See supra* n.3 (citing cases). Yet there has been no years-long epidemic of 16-employee businesses firing two workers in order to slyly avoid defending a federal discrimination claim. And a small employer would have no reason to fire one of its few employees to stave off a federal claim when in most jurisdictions it would still be

subject to state claims. *See* Pet. Br. 36 (noting that many state numerosity requirements are lower).

d. Finally, the government is wrong to suggest that if the numerosity requirement is jurisdictional, every other definition and element of a Title VII claim would be "jurisdictional" as well. U.S. Br. 13. The numerosity requirement is unique within the statute; for whether an entity comes within the statute's definition of an "employer" determines whether Congress intended it to have "complete immunity" and be "expressly exempted" from the Act. *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 & n.11 (1984). The term "employer," in contrast to the other definitions the statute sets forth, is crafted as a threshold and objectively verifiable prerequisite, quite distinct (for example) from messy inquiries into the motivation for a defendant's particular employment practices. And as previously noted, this bright-line fact is similar to the jurisdictional facts contained in numerous other statutes. *See supra* at 5-8.

V. EVEN IF THE NUMEROSITY REQUIREMENT WERE DEEMED NON-JURISDICTIONAL, A DEFENDANT'S FAILURE TO CHALLENGE NUMEROSITY AT THE OUTSET DOES NOT NECESSARILY WAIVE THE ISSUE.

If the Court concludes—against Congressional intent and the weight of authority—that Title VII's numerosity requirement is relevant only to the merits of a plaintiff's Title VII claim, the Court should make clear that an employer's failure to raise numerosity at the very outset of the litigation does not necessarily preclude the employer from raising the issue later.

A Title VII plaintiff bears the burden of proving each and every element of his or her claim. *See, e.g., International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (recognizing "the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to

create an inference that an employment decision was based on a discriminatory criterion illegal under the Act"). If numerosity is found to be an element of a plaintiff's Title VII claim—and not a jurisdictional predicate—then the plaintiff must prove numerosity to prevail.

In the District Court, Y & H Corporation denied plaintiff Arbaugh's allegations on the merits. *See* Pet. App. 46. To prevail on her claim, then, Arbaugh had to prove every element of her case—including numerosity. She presented no evidence that the defendant satisfied this requirement, and she therefore cannot prove her Title VII claim. *See* Mandell, *supra*, at 1072 ("If a Title VII claim is to have any chance of success, the number of employees must be determined, whether as a jurisdictional prerequisite or as one of the merits of the claim."). Respondent should be permitted to raise this deficiency in petitioner's proof if this case is remanded on grounds that the numerosity requirement goes not to jurisdiction, but to the merits.[10] A Title VII defendant cannot be said to have "waived" any argument that the requisite number of employees are lacking where the plaintiff has failed to put on such evidence in the first place.

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[10] A Title VII defendant in this situation should be permitted to avail itself of common law doctrines, such as excusable neglect, to raise the issue at a proceeding's later stage if that becomes necessary. *See generally*, *e.g.*, Charles Alan Wright, *et al.*, 11 Fed. Prac. & Proc. Civ. 2d § 2858 (2005).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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JENIFER ARBAUGH, PETITIONER,

v.

Y & H CORPORATION, D/B/A
THE MOONLIGHT CAFÉ, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the 15-employee requirement of Title VII is a limitation on the subject matter jurisdiction of the federal courts.

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INTEREST OF *AMICUS CURIAE*

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization with more than 1,400 members. IMLA's membership comprises local governmental entities (including cities, counties, and subdivisions thereof) as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other entities of local government. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing municipalities, counties, and special districts in the United States. IMLA frequently files briefs in this Court in cases involving matters that affect state and local governments. [1]

IMLA is greatly concerned about maintaining Title VII's 15-employee requirement as a limitation on the subject matter jurisdiction of the federal courts. Title VII's definition of "employer" extends to governmental agencies and political subdivisions of States. 42 §§ U.S.C. 2000e(b), 2000e(a). Municipal and county governments, however, are not generally treated as "unitary" employers for purposes of the statute.[2] Thus, plaintiffs may not "take a headcount of

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[1] The parties have consented to the filing of this brief; their letters of consent are on file with the Clerk. In accordance with Rule 37.6, the *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

[2] See, *e.g.*, *Lyes* v. *City of Riviera Beach, Fla.*, 166 F.3d 1332, 1344-1345 (11th Cir. 1999) (en banc) (holding that a city and its community redevelopment agency were not a single employer under Title VII

all county [or city] employees" in determining whether one of its agencies (*e.g.*, the tax collector) satisfies the 15-employee requirement for an "employer" for purposes of Title VII. See *Rogero* v. *Noone*, 704 F.2d 518, 520 (11th Cir. 1983). Inasmuch as the component agencies of counties and municipalities frequently have fewer than 15 employees, they routinely find themselves responding to Title VII lawsuits on their own—with limited human and financial resources to mount a defense. Properly interpreting Title VII's employee numerosity requirement as jurisdictional—as the Fifth Circuit did here—is critical to ensuring that these limited taxpayer-provided resources are not improperly spent on costly discovery battles rather than the provision of critical public services.

STATEMENT

Title VII makes it unlawful for an "employer" to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The statute exempts from coverage a number of entities, including agencies of the United States, Indian tribes, and small employers—those with fewer than 15 employees. *Id.* § 2000e(b).

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and noting the "presumption that governmental subdivisions denominated as separate and distinct under state law should not be aggregated for purposes of Title VII"); *Oden* v. *Oktibbeha County, Miss.*, 246 F.3d 458, 465 (5th Cir. 2001) (a county and its sheriff were not a single employer); *Bristol* v. *Board of County Comm'rs*, 312 F.3d 1213, 1217-1221 (10th Cir. 2002) (en banc) (a board of county commissioners and the county sheriff were not a single employer); *Sandoval* v. *City of Boulder*, 388 F.3d 1312, 1322-1223 (10th Cir. 2004) (a city and its regional communications center were not a single employer).

Petitioner, the plaintiff in this case, contends that she was subjected to sexual harassment and constructively discharged from her position as a waitress and bartender at the Moonlight Café, in violation of Title VII's prohibition on sex discrimination. After a trial on the merits, respondent moved to dismiss the action for lack of subject matter jurisdiction. Respondent argued that it had fewer than 15 employees during the relevant time period, such that the action fell outside the jurisdiction of the federal courts. The district court agreed and granted the motion, and the Fifth Circuit affirmed that decision. This Court subsequently granted certiorari to review the question whether the 15-employee requirement of Title VII is jurisdictional or simply an element of the plaintiff's cause of action.

SUMMARY OF ARGUMENT

In *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 (1984), this Court observed that when Congress exempted businesses with fewer than 15 employees from Title VII, it granted them "complete immunity" from the statute. This case presents the question whether this "complete immunity" is simply an exemption from liability or rather, as we contend, a jurisdictional requirement.

I. "The structure of Title VII, the congressional policy underlying it, and the reasoning of [this Court's] cases . . . all lead to th[e] conclusion" that the 15-employee requirement of Title VII is jurisdictional. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). As an initial matter, Congress placed the term "employer" in the preamble of § 703(a)—separate from the description of conduct for which employers may be found liable. The determination whether a defendant is among the *class of entities* to whom the statute applies thus logically precedes inquiry into the merits of the claim of discrimination and should be decided at the outset of the case, along with any other jurisdictional matters.

In civil rights cases arising under 42 U.S.C. § 1983, this Court has taken exactly that approach: Unless the defendant is a covered "person" within the meaning of § 1983, the Court has held that courts lack jurisdiction to hear the plaintiff's claims. See, *e.g.*, *Aldinger* v. *Howard*, 427 U.S. 1, 17 (1976).

Such an approach to cases under Title VII, a related body of federal civil rights law, accords with the congressional policy that underlies Congress's exemption of small employers. The legislative history demonstrates that Congress sought to protect such entities—which include many local agencies with limited resources—not only from Title VII liability, but also from the burden of having to defend themselves against fact-intensive Title VII claims.

Were there any doubt that the 15-employee requirement is more than simply an element of the plaintiff's case, settled principles of statutory interpretation would resolve that doubt in favor of a jurisdictional reading of § 701(b). Congress relied on its commerce power in enacting Title VII, and it understood the minimum-employee requirement as a means of respecting the limits of that power. Where a reading of a statute raises significant constitutional questions, the Court requires a clear indication that Congress intended that result. There is no such indication here. To the contrary, the legislative record reveals widespread concern that small businesses' activities did *not* substantially affect commerce within the meaning of this Court's precedents. The questionable validity of a broader reading of Title VII confirms that this Court should read the 15-employee requirement as jurisdictional.

II. A jurisdictional reading of the numerosity requirement also vindicates Congress's desire to spare small employers the burden of defending Title VII claims—thus preserving their ability to compete or, in the case of municipalities and counties, to provide public services. Early resolution of the threshold question whether the

defendant enjoys "complete immunity" from suit protects defendants from the costs of investigating claims, conducting discovery, and preparing witnesses—costs that can most easily be avoided under a jurisdictional reading of the 15-employee requirement. For small businesses, this can mean the difference between staying afloat and bankruptcy. For local governments, it can mean the difference between meeting or failing to meet vital public needs.

Litigating Title VII claims is expensive, in part because such claims turn so often on questions of intent. As this Court has acknowledged, "the elusive factual question of intentional discrimination" (*Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 256 n.8 (1981)) is "both sensitive and difficult" and cannot generally be answered by direct evidence (*United States Postal Serv. Bd. of Governors.* v. *Aikens*, 460 U.S. 711, 716 (1983)). Summary judgment is thus relatively rare in Title VII cases, and a nonjurisdictional reading of the numerosity requirement would create tremendous pressure to settle even meritless claims.

Indeed, the Solicitor General acknowledges that Congress was "concerned that including all small businesses in the scope of Title VII would impose bureaucratic and litigation costs that small companies could not bear." U.S. Br. 24 n.4. But he provides no convincing reason why Congress would subject such employers to the tremendous burden of mounting a defense to claims under a statute that grants them "complete immunity." *Hishon*, 467 U.S. at 78.

ARGUMENT

II. The Text, Structure, and Purpose of Title VII All Demonstrate that the 15-Employee Requirement of Section 701(b) Is Jurisdictional.

Whether Title VII's requirements limit the courts' subject matter jurisdiction or, instead, are garden-variety elements

of the plaintiff's claim turns on an analysis of "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of [this Court's] cases." See *Zipes*, 455 U.S. at 393. These considerations "all lead to this conclusion" (*ibid.*): Section 701(b)'s 15-employee requirement is jurisdictional.

Section 703(a) of Title VII, entitled "Employer practices," provides in relevant part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Section 701(b) of Title VII in turn provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.* § 2000e(b). Finally, § 706(f)(3) of the Act states in relevant part that "[e]ach United States district court . . . shall have jurisdiction of actions brought under this title." *Id.* § 2000e-5(f)(3).

The placement of the term "employer" in the preamble to § 703—apart from the description of acts that trigger liability—confirms that it is a threshold issue and distinct from merits questions involving the defendant's *conduct toward the plaintiff*. The determination whether the defendant is an "employer" *precedes* any inquiry into whether the defendant "discriminate[d]" against the plaintiff. That is, before the court delves into merits issues such as whether the plaintiff was subjected to "discrimination," whether the discrimination concerned

"compensation, terms, conditions, or privileges of employment," or whether the defendant discriminated against the plaintiff "because of" her sex (or some other prohibited reason), it must first determine that the defendant is among the *class of entities* to whom the statute applies. As this Court has elsewhere explained: when Congress "expressly exempted . . . small businesses" from Title VII, it granted them "*complete* immunity" from Title VII. *Hishon*, 467 U.S. at 78 & n.11 (emphasis added). This immunity for small employers—including many, if not most, municipal and county agencies—entails relief not only from liability, but also from having to defend themselves on the merits.

A. This Court's Section 1983 Decisions Confirm that in the Context of Federal Civil Rights Legislation, Limitations on the Class of Entities Subject to Liability Are Jurisdictional.

This Court's decisions concerning 42 U.S.C. § 1983 and 28 U.S.C. § 1343, its jurisdictional partner, are instructive in this regard. Section 1983 renders liable every "person" who, under color of state law, deprives citizens of civil rights in violation of the Constitution or federal law, and § 1343 grants federal district courts jurisdiction of civil actions brought to redress such deprivations. This Court has read the grant of subject matter jurisdiction in § 1343 to extend *only* to cases in which the defendant is covered by § 1983.

1. In *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), for example, the Court considered whether § 1343 extended to equitable § 1983 claims against *cities*. After reiterating that § 1983's definition of "person" did not cover municipalities, the Court held that § 1343's grant of subject matter jurisdiction precisely tracked the scope of § 1983: Because "'Congress did not undertake to bring municipal corporations within the ambit of' § 1983," "[t]he District

Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343." *Id.* at 513 (citation omitted).

Similarly, in *Aldinger* v. *Howard*, 427 U.S. 1 (1976), the Court addressed whether § 1343 conferred subject matter jurisdiction over a § 1983 claim against a *county*—which, like a city, was not then a "person" subject to suit under § 1983. The Court held that it does not, confirming that "the reach of the statute conferring jurisdiction *should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress.*" *Id.* at 17 (emphasis added). The Court further emphasized that jurisdictional provisions should be read in light of "deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts." *Id.* at 16-17. In sum, "Congress excluded [counties] from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3)." *Id.* at 17.

The parallels between these § 1983 cases and the present case are striking. There, as here, the threshold issue was the meaning of terms (there "persons," here "employers") that delimited the class of defendants who were properly subject to federal civil rights legislation. There, as here, the question was not whether the defendant's *conduct* violated the terms of the statute, but whether the defendant was a *type of entity* that Congress determined to regulate. There, as here, the statutory provision delimiting the courts' subject matter jurisdiction (§ 1343(3)) was separate from the substantive provision confining liability to certain parties (§ 1983). There, as here, the jurisdictional provision contained no explicit reference to the class of entities covered by the statute. And there, as here, small state and local agencies would have borne litigation burdens beyond those that Congress intended if the Court had formalistically held that the "person" limitation of the Civil Rights Act was

found only in § 1983—and thus could not be read to limit subject matter jurisdiction under § 1343.

Just as the Court in *City of Kenosha* and *Aldinger* read § 1343 in light of § 1983, so should the Court read § 706(f)(3) of the Civil Rights Act in light of § 701(b) of that Act. As the Court explained in *Aldinger*, "[t]he question . . . is whether by virtue of the statutory grant of subject-matter jurisdiction, . . . Congress has addressed itself to the *party* as to whom jurisdiction . . . is sought." 427 U.S. at 16 (emphasis added). If a defendant is not an "employer" within the meaning of § 701(b), neither is a suit against the defendant within the courts' jurisdiction under § 706(f)(3). The fact that "the 15-employee requirement is found in Title VII's definition of 'employer,'" "but not in Title VII's *jurisdictional* provision" (U.S. Br. 6), is immaterial under these decisions.

2. Although the Solicitor General contends otherwise (U.S. Br. 21), this Court's decision in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), does not lead to a different result. The plaintiff there asserted jurisdiction under § 1343 as well as § 1331, and the Court did not need to analyze subject matter jurisdiction under § 1343 because it found jurisdiction under § 1331. See 429 U.S. at 278-279. Indeed, citing *City of Kenosha*, the Court expressly observed that "if this were a § 1983 action, brought under the special jurisdictional provision of 28 U.S.C. § 1343 which requires no amount in controversy, it would be appropriate to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged." *Ibid.* Thus, *Mt. Healthy* is of a piece with *Aldinger* and *City of Kenosha*—a fact confirmed by this Court's statement just last Term that "Congress, in enacting § 1343, had declined (albeit implicitly) to extend federal jurisdiction over any party who could not be sued

under the federal civil rights statutes." See *ExxonMobil* v. *Allapatah*, 125 S. Ct. 2611, 2619 (2005).[3]

Petitioner and the United States suggest that if Title VII's 15-employee requirement goes to the courts' subject matter jurisdiction, the effect will be a slippery slope: "every other required element of the plaintiff's case would presumably be jurisdictional as well." U.S. Br. 13; Pet. Br. 19. But as these § 1983 cases recognize, the threshold question of whether a statute applies to a certain *class of defendants* is not like other garden-variety Title VII issues involving liability. Where Congress excludes a class of entities from regulation, that determination ordinarily ought to protect those entities not only from liability for their conduct, but also from the "potentially crushing expense" of extended discovery on the whole range of fact-intensive issues that a Title VII suit raises. See *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.) As Congress recognized, this is particularly true for small entities—including a host of state and municipal agencies—whose very survival or ability to provide public services may depend on their ability to avoid the extraordinary costs of mounting a defense to fact-intensive claims of discrimination.

As a practical matter, moreover, the question of whether a party is within the class of entities covered by a statute can be resolved relatively easily on a motion to dismiss or with limited discovery. This is especially so with Title VII's numerosity requirement. Whether an employer has an "employee" for Title VII purposes is determined by the "payroll method," which simply inquires how many persons appear on the payroll during the relevant time period. See *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519

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[3] See also *Finley* v. *United States*, 490 U.S. 545, 573 (1989) (Stevens, J., dissenting) ("Congress' exclusion of municipal corporations from the definition of persons under § 1983 . . . evinced an intent to preclude the exercise of federal-court jurisdiction over them").

U.S. 202, 206 (1997). The Court in *Walters* observed that whether a defendant satisfies the numerosity requirement is "readily demonstrated" by examination of the payroll, and it rejected an alternative reading of Title VII's numerosity requirement in part because it "would turn the coverage determination into an incredibly complex and expensive factual inquiry." *Id.* at 206, 210 (emphasis added). Under current precedent, then, whether a defendant has sufficient employees to fall within Title VII's jurisdiction turns on a straightforward assessment of the payroll: "all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when." 519 U.S. at 211. The United States' suggestion that the 15-employee inquiry is "fact-intensive" (U.S. Br. 16) cannot be squared with this analysis, which it ignores.

The nature of the court's factual inquiry into the number of a defendant's employees is wholly unlike that involved in analyzing "the elusive factual question of intentional discrimination." See *Burdine*, 450 U.S. at 255 n.8. Merits-related Title VII issues—such as whether the plaintiff suffered adverse treatment "because of" her sex—are "both sensitive and difficult," since "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." See *Aikens*, 460 U.S. at 716; see also *Singfield* v. *Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004) (observing that "an employer's true motivations are particularly difficult to ascertain"). Understandably, then, Congress made the courts' subject matter jurisdiction under Title VII turn on the discrete, objective, and "readily demonstrated" threshold question of whether an employer has 15 employees. *Walters*, 519 U.S. at 206.

3. *Zipes* is not to the contrary. Relying substantially on the legislative history, the Court there held that "Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement." 455 U.S.

at 394. That is not surprising. In contrast to statutory questions concerning the class of entities covered by Title VII—which determines the availability of "complete immunity" for small employers (*Hishon*, 467 U.S. at 78)—a limitation period's applicability is "an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver." *American Trucking Ass'ns, Inc.* v. *Smith*, 496 U.S. 167, 221 (1990) (Stevens, J., dissenting).

More importantly, the Court's overall analytical approach in *Zipes* in fact supports affirmance here. *Zipes* turned on an analysis of "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of [this Court's] cases." 455 U.S. at 393. Each of those factors supports a jurisdictional reading of the 15-employee requirement. *First*, under the structure of Title VII, the requirement is located in an independent clause (the preamble), separate from the paragraph that establishes the terms of liability. *Second*, the "congressional policy" behind the requirement is to spare small employers the exorbitant expense of defending fact-intensive discrimination claims—and that policy would be undermined by a nonjurisdictional reading of § 701(b). See Part II, *infra*. *Third*, this Court's § 1983 decisions confirm that where Congress excludes a class of entities from the federal civil rights laws, such exclusions should ordinarily be viewed as jurisdictional.[4]

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[4] The Solicitor General acknowledges that subject matter jurisdiction "can and does ... turn in appropriate cases on whether the United States is a party; whether the defendant is a foreign state or member of a foreign mission; or whether the parties are citizens of different States." U.S. Br. 22 (citations omitted). Thus, he rightly points out that many instances in which the identity of the defendant is relevant to the courts' subject matter jurisdiction involve *governmental* defendants. But that does not mean that cases against the government are the *only* cases in which this is true. Contrary to the Solicitor General's assertion, no

B. The Canon that Statutes Should Be Interpreted to Avoid Constitutional Difficulties Resolves Any Doubt in Favor of a Jurisdictional Reading of Title VII's 15-Employee Requirement.

As demonstrated above, Title VII's 15-employee requirement is most naturally read, both textually and in light of Congress's purpose to exclude small employers from Title VII coverage, as a limitation on the subject matter jurisdiction of the courts. But if there were any doubt on this score, settled rules of statutory construction would resolve that doubt in favor of a jurisdictional reading of § 701(b).

One such rule is that "[i]t is to be presumed that a cause lies outside [the federal courts'] limited jurisdiction," and "the burden of establishing the contrary rests on the party asserting jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). This canon is closely related to the more general rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). "This cardinal principle . . . has for so long been applied by this Court that it is beyond debate." *Ibid.* The Court does not assume that Congress casually "push[es] the limit of congressional authority." *Solid Waste Agency of No. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (*SWANCC*). Thus, "[w]here an . . . interpretation

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one is suggesting that "questions regarding the 'applicability' of statutes or the classes of people who may be sued under them are *necessarily* jurisdictional." *Ibid.* But neither is it true that the identity of the defendant, even if a private entity, is *necessarily* a merits question.

of a statute invokes the outer limits of Congress' power" or raises "significant constitutional questions," the Court "expect[s] a clear indication that Congress intended that result." *Id.* at 172, 174.

These principles apply forcefully here. Congress relied on its interstate commerce power as the constitutional basis for enacting Title VII (see 42 U.S.C. § 2000e(b); U.S. Const. art. I, § 8, cl. 3; Pet. Br. 14 n.18), and it adopted Title VII's employee numerosity requirement as a means of respecting the limits of that power. The questionable constitutionality of a broader reading of Title VII confirms that this Court should read the 15-employee requirement as a jurisdictional limitation rather than simply an element of the plaintiff's cause of action.

1. It is well settled that Congress may not regulate intrastate activities under the commerce power unless such activities "'substantially affect interstate commerce.'" *United States* v. *Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)). During the legislative debates concerning Title VII, numerous members of Congress expressed the view that the statute regulated activities lacking such an effect and that the minimum-employee requirement was a vital proxy for the required nexus with commerce. [5] As Representatives Poff and Cramer expressed the point: "'[t]he bill proceeds on a theory ... that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured.'" H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (statement of minority views of Reps. Poff & Cramer). In short, "the floor debates concerning Title VII suggest that the minimum employee threshold was ... deemed

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[5] See, *e.g.*, U.S. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 at 2043, 2050-51, 2061, 2066, 3076, 3078-79, 3079-84, 3084-90 (1968).

necessary to justify federal legislation in the employment context under the Commerce Clause." *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1322 (2d Cir. 1995) (Parker, J., dissenting) (collecting authorities).

The United States denies that the 15-employee threshold requirement has any constitutional underpinnings whatsoever. U.S. Br. 24. Under its view, the requirement that an employer be "in an industry affecting commerce" (§ 2000e(b)) properly invokes Commerce Clause authority *without regard to* the 15-employee threshold. *Ibid.* But that view of the commerce power goes well beyond *Lopez*. The Court there took pains to reaffirm that the regulated activity's effect on interstate commerce must be "substantial" (*Lopez*, 514 U.S. at 558); it did not authorize regulation of an activity lacking such a connection on the basis that it was within an industry that does. Accord *Morrison*, 529 U.S. at 610. As the Court explained in *SWANCC*, Commerce Clause analysis turns on whether "the *precise object or activity*" at issue "in the aggregate[] substantially affects interstate commerce." See 531 U.S. at 173 (emphasis added).

The Solicitor General's view would authorize Title VII regulation of a neighborhood lemonade stand with just two employees that does not itself have any discernible effect on interstate commerce, solely on the basis that it happens to be within an industry (concessions) that does. Likewise, it would permit Title VII regulation of a three-employee leaf-raking business that does not affect commerce on the basis that it is part of a broader industry (say, landscaping) that does. Congress, however, rightly believed that it needed a tighter nexus to interstate commerce, and it found that nexus in the minimum-employee requirement. See *SWANCC*, 531 U.S. at 173 (declining to read § 404(a) of the Clean Water Act to reach isolated, intrastate ponds); *Jones* v. *United States*, 529 U.S. 848, 851 (2000) (declining to read 18 U.S.C. § 844(i), the federal arson statute, to reach the arson

of private residences, because "constitutionally doubtful constructions should be avoided where possible").

The Solicitor General also denies that Congress viewed Title VII's minimum-employee requirement as relevant to its Commerce Clause authority. He acknowledges the legislative statement of Representatives Poff and Cramer quoted above, but asserts that "[t]aken as a whole, the legislative history does not support that statement." U.S. Br. 24 n.4. As a review of the citations collected above (see n.5) demonstrates, however, there were extensive Commerce Clause objections to Title VII. And in response to these objections, supporters sought to draw a connection between employee numerosity and Congress's commerce power. See, *e.g.*, 110 Cong. Rec. 6548 (Mar. 30, 1964) (Sen. Humphrey); *id.* at 6566 (Mar. 30, 1964) (Sen. Kuchel); *id.* at 7088 (Apr. 7, 1964) (Sen. Stennis); *id.* at 13088 (June 9, 1964) (Sen. Humphrey). As Senator Humphrey explained: it is only "[w]hen [small businesses] get above 25, [that] they get into *some reasonable degree of gross product* in terms of income or output or salaries or goods or services." *Ibid.* (emphasis added). Mindful of the limits of its commerce power, Congress sought to avoid regulating employers whose activities had little effect on the gross product.[6]

In any event, whether or not Title VII would ultimately *violate* the Commerce Clause if it reached smaller employers, Congress's concern about the issue demonstrates that the application of Title VII to smaller employers at least raises a "significant constitutional question[]." *SWANCC*, 531 U.S. at 174. Moreover, the legislative record provides no "clear

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[6] Indeed, to the extent that the Commerce Clause concerns reflected in the legislative history of Title VII involved the earlier, 25-employee minimum (Congress reduced the requirement from 25 to 15 employees in the Equal Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103), those concerns are heightened under the current 15-employee requirement.

indication" that Congress intended to push the outer limits of its commerce power. See *ibid.* Quite the contrary.

2. Citing the dissenting opinion in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 813 (1993), the Solicitor General notes that legislative and subject matter jurisdiction are distinct concepts and suggests that Title VII's legislative history "speak[s] only to Congress's legislative jurisdiction." U.S. Br. 24, 28. But he offers no reason why Congress would grant the courts jurisdiction over matters that it lacks the power to regulate. And as the majority in *Hartford Fire* recognized, there are times when the constitutionally required nexus with interstate commerce "simultaneous[ly]" implicates both legislative *and* subject matter jurisdiction. See 509 U.S. at 795-797 & n.22; see also *United Phosphorus, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 947-948 (7th Cir. 2003) (en banc). This is just such a case.

This Court's decision in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991), seriously undercuts the Solicitor General's position. The Court there dismissed a Title VII claim brought by a United States citizen employed abroad by an American employer. The Solicitor General acknowledges that the Court there "describes as 'jurisdictional' the portion of the definition of 'employer' that requires that the defendant be 'engaged in interstate commerce.'" U.S. Br. 28. But, again citing the dissent in *Hartford Fire*, he says that the Court was "referring to Congress's 'legislative jurisdiction' to regulate interstate commerce," and that "nothing in *Arabian American Oil Co.* even addresses the courts' subject matter jurisdiction." *Ibid.* There are two difficulties with this argument.

First, it ignores the fact that no one in *Arabian American Oil* questioned Congress's legislative authority to regulate the employment practices of overseas United States employers. See 499 U.S. at 248 ("Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United

States"). *Second*, and more importantly, it ignores the fact that the Court there, after concluding that Title VII was categorically inapplicable to United States employers operating overseas, affirmed the lower courts' dismissal *for lack of subject matter jurisdiction*. See *id.* at 247. Thus, *Arabian American Oil* supports the conclusion that where Title VII does not reach a defined class of defendants, the courts lack subject matter jurisdiction to hear claims against those defendants.

In any event, the substantial constitutional concerns with an expansive reading of § 701(b) point toward a jurisdictional understanding of the 15-employee requirement. See also *Tomka*, 66 F.3d at 1322 (Parker, J., dissenting). As the Court explained in *Aldinger*, "the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress." 427 U.S. at 17 (emphasis added).

II. Reading Title VII's 15-Employee Requirement as a Threshold Jurisdictional Issue Vindicates Congress's Intention to Shield Small Employers from the Practical Burden and Expense of Title VII Litigation.

Strong practical considerations further support the conclusion that § 701(b) is jurisdictional. In particular, this reading of the statute would vindicate Congress's desire to spare small employers—including many municipal government agencies—the enormous burden and expense of defending themselves against employment discrimination claims.

1. As this Court has observed: "the congressional decision to limit the coverage of [Title VII] to firms with 15 or more employees has its own justification that must be respected—namely, easing entry into the market and preserving the competitive position of smaller firms."

Clackamas Gastroenterology Assocs., P.C. v. *Wells*, 538 U.S. 440, 447 (2003). We urge the Court to read § 703(f)(5) in light of "the congressional policy underlying [Title VII's exclusion of small employers]." *Zipes*, 455 U.S. at 393; see also *Aldinger*, 427 U.S. at 17 ("the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action").

In their effort to "preserv[e] the competitive position" of small entities, members of Congress specifically considered "the burdens placed upon a small business forced to comply with federal regulations *and defend itself against a Title VII suit.*" *Tomka*, 66 F.3d at 1314 (emphasis added). The views of New Hampshire Senator Norris Cotton are representative:

> In short, it is all very well to talk about enforcing morality; and large industries encounter no hardship in handling such matters, for they have teams of lawyers organized to deal with them.
>
> But Senators should think twice before they vote in favor of the passage of a bill which would make it possible for an investigator or a Federal administrative officer to reach a conclusion, and thus make it incumbent on the small businessman to carry the case to the courts if he is to get justice.

110 Cong. Rec. S13092 (1964) (statement of Sen. Cotton). As the Solicitor General acknowledges, members of Congress such as Senator Cotton were "concerned that including all small businesses in the scope of Title VII would impose bureaucratic and litigation costs that small companies could not bear." U.S. Br. 24 n.4.

Notwithstanding Congress's desire to protect small-scale employers, it is an inescapable fact of modern employment litigation that municipalities and other small employers often face what Judge Posner has aptly described as "the potentially crushing expense of mastering the

intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Clackamas*, 538 U.S. at 447 (quoting *Papa*, 166 F.3d at 940); accord *Tomka*, 66 F.3d at 1314; *Miller* v. *Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). If a small local agency lacks the ability to seek early dismissal of Title VII suits on the basis that it has fewer than 15 employees—and thus should not be subject to suit *at all*—it will incur substantial defense costs in:

- conducting an initial investigation of the allegations;
- retrieving, reviewing, and organizing data for electronic and written discovery;
- preparing and producing witnesses for depositions;
- drafting summary judgment motions; and
- if necessary, putting on a defense at trial.

These routine tasks in litigation require time, money, and human resources—all scarce commodities in small municipal offices operating on tight budgets.

The cost of preparing a defense to a lawsuit is substantial in any case, but it is even more likely to be crippling in a Title VII case—the central allegation in which involves "the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 256 n.8. As this Court observed in *Aikens*, "[t]he factual inquiry" into "whether the defendant intentionally discriminated against the plaintiff" is "both sensitive and difficult" and typically cannot be answered by direct evidence. 460 U.S. at 711, 716; see *ibid.* (noting that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"). Thus, a Title VII case is almost always based on circumstantial evidence, requiring inferential arguments and substantial discovery.

Moreover, the plaintiff's burden of proving a prima facie case under the framework of *McDonnell Douglas Corp.* v.

Green, 411 U.S. 792 (1973), is minimal. *Burdine*, 450 U.S. at 253 (describing the burden as "not onerous"); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 270 (1989) (O'Connor, J., concurring) (describing the prima facie case as "not difficult to prove"). Courts applying the *McDonnell Douglas* burden-shifting analysis routinely leave for the jury questions about the plaintiffs' qualifications for particular positions, the severity and pervasiveness of alleged harassment, and whether employers' proffered nondiscriminatory justifications for the alleged adverse employment action are pretextual. One court has described the *McDonnell Douglas* framework as "hav[ing] the objective of defining the plaintiff's initial prima facie burden as being so minimal that it is virtually impervious to a motion based on evidentiary insufficiency." *Henderson* v. *Jantzen, Inc.*, 719 P.2d 1322, 1324 (Ore. App. 1986).

Whether or not plaintiff's burden is that minimal, every federal court of appeals has held that once the plaintiff establishes a *prima facie* case under Title VII, summary judgment is ordinarily inappropriate. See *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Rosen* v. *Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991); *Marzano* v. *Computer Sci. Corp.*, 91 F.3d 497, 509 (3d Cir. 1996); *Holmes* v. *Bevilacqua*, 774 F.2d 636, 638 (4th Cir. 1985); *Hayden* v. *First Nat'l Bank*, 595 F.2d 994, 997 (5th Cir. 1979); *Singfield* v. *Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004); *Powers* v. *Dole*, 782 F.2d 689, 694 (7th Cir. 1986); *Crawford* v. *Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994); *Lowe* v. *City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985); *Orr* v. *City of Albuquerque*, 417 F.3d 1144, 1149-52 (10th Cir. 2005); *Mulhall* v. *Advance Sec., Inc.*, 19 F.3d 586, 598 (11th Cir. 1994); *McKenzie* v. *Sawyer*, 684 F.2d 62, 67 (D.C. Cir. 1982). Thus, once a case reaches the summary judgment stage, it is difficult for an employer of any size to avoid a trial. As a consequence, any municipal government accused of

employment discrimination faces the near-certainty of protracted and burdensome litigation.

2. The burdens of litigation are uniquely harmful to municipal governments and, ultimately, their constituents. Municipal governments are obligated to provide critical public services, and they must meet these obligations with limited financial resources and intense public scrutiny. Every dollar spent on litigation is a dollar taken away from public services. Every hour spent collecting and preparing information for electronic or written discovery is an hour in which the municipal government is shorthanded in responding to citizens' needs. In short, protracted litigation often translates into disruptions in public services. The impact of litigation costs on municipalities is especially significant given the "fiscal recession" that American cities continue to face. See generally Michael A. Pagano & Christopher Hoene, *City Fiscal Conditions in 2004*, 20 (National League of Cities 2004).

The costs of litigation also create tremendous pressure for municipal governments to settle employment discrimination lawsuits—even those lacking merit. Reasonable government officials who must consider the impact of additional litigation costs on the provision of public services will often opt for settlement simply to avoid the costs of litigation, even when they are confident that Title VII does not apply to their offices and even when they believe that their conduct did not violate the statute. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 617 (2001) (Scalia, J., concurring) (noting that defendants might "'abandon[] the fray' because the cost of litigation – either financial or in terms of public relations – would be too great").

The costs of discovery alone may be sufficient to justify, as a financial matter, settlement of a meritless claim. As Justice Breyer has observed: "discovery and discovery-related judicial proceedings take time, they are expensive,

and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes." See *Intel Corp.* v. *Advanced Micro Devices*, 124 S. Ct. 2466, 1485 (2004) (Breyer, J., dissenting). At the end of the day, even a defense verdict may not be worth the candle, since a verdict in a Title VII case does not come with a refund of time or money. Merely defending the lawsuit is a burden that a small municipal government often cannot afford to bear.

3. Treating the numerosity requirement as a jurisdictional element in a Title VII case would frequently ease the burden of litigation for small-scale employers. If the numerosity requirement were deemed jurisdictional, the plaintiff would be required to plead the jurisdictional fact in his complaint, *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936), subject to Fed. R. Civ. P. 11. Even if the plaintiff alleged that his employer had at least 15 employees "on information and belief," the employer could move for dismissal under Fed. R. Civ. P. 12(b)(1) or the district court could raise the numerosity issue *sua sponte* and order discovery *limited to that issue*. See *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988) (stating that "[i]t is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters"). Only upon its determination that the employer had at least 15 employees, and thus was covered by Title VII at all, would the court need to consider the plaintiff's substantive allegations.

In most cases, the numerosity question will not require significant discovery or involve serious controversy. Unlike the merits issues in a Title VII case, the number of employees is a matter of readily ascertainable and objective fact, not a subject of inference or significant testimonial dispute. "[T]he ultimate touchstone under § 2000e(b) is whether an employer has employment relationships with 15

or more individuals for each working day in 20 or more weeks during the year in question." *Walters*, 519 U.S. at 212. Under this rule, "all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when." *Id.* at 211. One of the virtues of this rule is that it avoids "turn[ing] the coverage determination into an incredibly complex and expensive factual inquiry." *Id.* at 210.

To be sure, there may be cases at the margins in which the 15-employee requirement necessitates discovery into issues such as whether a worker is an "independent contractor" or an "owner" rather than an employee. But contrary to the parade of horribles in petitioner's brief (at 27-31), these cases are certain to prove exceptional.

And even if the discovery required to sort through the numerosity question *occasionally* results in a significant investment of time or a slight delay in reaching the merits, that is of no great moment. The plaintiff must satisfy the 15-employee requirement regardless of whether it is jurisdictional, and thus the only question is *when* she will be required to make that showing. But for the employer with fewer than 15 employees—who is spared the expense of additional, unrelated discovery in a suit that the plaintiff is not entitled to bring against him—the opportunity to address numerosity at the outset of the case could result in significant savings (or perhaps preservation of the business). In short, given its logical priority in any Title VII case and the relative ease of analysis, no sound policy reason favors treating the numerosity requirement as an element of the Title VII claim rather than an antecedent jurisdictional element.

Congress plainly intended to shield small employers, including small municipal employers, from the burdens of Title VII litigation. Those burdens are significant—especially for municipal agencies operating in small offices with modest financial resources—and they are largely

unavoidable absent an opportunity to have such cases resolved at an early stage. Treating Title VII's 15-employee requirement as a jurisdictional prerequisite vindicates the clear purpose of the statute and frees small-scale municipal governments to do the critical work that they are charged by their citizens to do, unencumbered by the burden of litigation under a statute that grants them "complete immunity." *Hishon*, 467 U.S. at 78.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ARBAUGH *v.* Y & H CORP. DBA THE MOONLIGHT CAFE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04–944. Argued January 11, 2006—Decided February 22, 2006

Title VII of the Civil Rights Act of 1964 makes it unlawful for "an employer . . . to discriminate against any [employee] with respect to . . . sex," 42 U. S. C. §2000e–2(a)(1), and defines "employer" as "a person . . . who has fifteen or more employees," §2000e(b). The Act's jurisdictional provision empowers federal courts to adjudicate civil actions "brought under" Title VII. §2000e–5(f)(3). Title VII actions also fit within the Judicial Code's grant of subject-matter jurisdiction to federal courts over actions "arising under" federal law. 28 U. S. C. §1331. At the time Title VII was enacted, §1331 contained a $10,000 amount-in-controversy threshold, which left Title VII claims below that amount uncovered. Section 2000e–5(f)(3) assured that the amount-in-controversy limitation would not impede a Title VII complainant's access to a federal forum. Since 1980, when Congress amended §1331 to eliminate the amount-in-controversy threshold, §2000e–5(f)(3) has served simply to underscore Congress' intention to provide a federal forum for Title VII claims. Because Congress has also authorized federal courts to exercise "supplemental" jurisdiction over state-law claims linked to a federal claim, 28 U. S. C. §1367, Title VII plaintiffs may pursue complete relief in federal court.

The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised at any stage in the litigation, even after trial and the entry of judgment, Rule 12(h)(3). See *Kontrick* v. *Ryan*, 540 U. S. 443, 455. By contrast, the objection that a complaint "fail[s] to state a claim upon which relief can be granted," Rule 12(b)(6), endures only up to, not beyond, trial on the merits, Rule 12(h)(2).

Petitioner Arbaugh sued her former employer, respondent Y&H

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Corporation, in Federal District Court, charging sexual harassment in violation of Title VII and asserting related state-law claims. The case was tried to a jury, which returned a verdict for Arbaugh. After the court entered judgment on that verdict, Y&H moved to dismiss the entire action for want of federal subject-matter jurisdiction, asserting, for the first time, that it had fewer than 15 employees on its payroll and therefore was not amenable to suit under Title VII. Although recognizing the unfairness and waste of judicial resources that granting the motion would entail, the District Court, citing Federal Rule 12(h)(3), considered itself obliged to do so because it believed the 15-or-more-employees requirement to be jurisdictional. It therefore vacated its prior judgment and dismissed Arbaugh's Title VII claim with prejudice and her state-law claims without prejudice. The Fifth Circuit affirmed based on its precedent holding that unless the employee-numerosity requirement is met, federal-court subject-matter jurisdiction does not exist.

Held: Title VII's numerical threshold does not circumscribe federal-court subject-matter jurisdiction. Instead, the employee-numerosity requirement relates to the substantive adequacy of Arbaugh's Title VII claim, and therefore could not be raised defensively late in the lawsuit, *i.e.*, after Y&H had failed to assert the objection prior to the close of trial on the merits. The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28 U. S. C. §1331, which provides for "[f]ederal-question" jurisdiction, and §1332, which provides for "[d]iversity of citizenship" jurisdiction. A plaintiff properly invokes §1331 jurisdiction when she pleads a colorable claim "arising under" the Federal Constitution or laws. See *Bell* v. *Hood*, 327 U. S. 678, 681–685. She invokes §1332 jurisdiction when she presents a claim between parties of diverse citizenship that exceeds the required jurisdictional amount, currently $75,000. See §1332(a). Arbaugh invoked federal-question jurisdiction under §1331, but her case "aris[es]" under a federal law, Title VII, that specifies, as a prerequisite to its application, the existence of a particular fact, *i.e.*, 15 or more employees. The Court resolves the question whether that fact is "jurisdictional" or relates to the "merits" of a Title VII claim mindful of the consequences of typing the 15-employee threshold a determinant of subject-matter jurisdiction, rather than an element of Arbaugh's claim for relief. First, "subject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived." *United States* v. *Cotton*, 535 U. S. 625, 630. Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 583. Nothing in Title VII's text indicates that

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Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met. Second, in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own. If satisfaction of an essential element of a claim is at issue, however, the jury is the proper trier of contested facts. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151. Third, when a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety. Thus, the trial court below dismissed, along with the Title VII claim, pendent state-law claims fully tried by a jury and determined on the merits. In contrast, when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to §1367, over pendent state-law claims.

While Congress could make the employee-numerosity requirement "jurisdictional" if it so chose, neither §1331 nor Title VII's jurisdictional provision, 42 U. S. C. §2000e–5(f)(3), specifies any threshold ingredient akin to 28 U. S. C. §1332's monetary floor. Instead, the 15-employee threshold appears in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394. Given the unfairness and waste of judicial resources entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, the sounder course is to refrain from constricting §1331 or §2000e–5(f)(3), and to leave the ball in Congress' court. If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line here yields the holding that Title VII's 15-employee threshold is an element of a plaintiff's claim for relief, not a jurisdictional issue. Pp. 8–15.

380 F. 3d 219, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–944

JENIFER ARBAUGH, PETITIONER *v.* Y & H CORPORATION, DBA THE MOONLIGHT CAFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 22, 2006]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the distinction between two sometimes confused or conflated concepts: federal-court "subject-matter" jurisdiction over a controversy; and the essential ingredients of a federal claim for relief. Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer . . . to discriminate," *inter alia*, on the basis of sex. 42 U. S. C. §2000e–2(a)(1). The Act's jurisdictional provision empowers federal courts to adjudicate civil actions "brought under" Title VII. §2000e–5(f)(3). Covering a broader field, the Judicial Code gives federal courts subject-matter jurisdiction over all civil actions "arising under" the laws of the United States. 28 U. S. C. §1331. Title VII actions fit that description. In a provision defining 13 terms used in Title VII, 42 U. S. C. §2000e, Congress limited the definition of "employer" to include only those having "fifteen or more employees," §2000e(b). The question here presented is whether the numerical qualification contained in Title VII's definition of "employer" affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII

claim for relief.

The question arises in this context. Jenifer Arbaugh, plaintiff below, petitioner here, brought a Title VII action in federal court against her former employer, defendant-respondent Y&H Corporation (hereinafter Y&H), charging sexual harassment. The case was tried to a jury, which returned a verdict for Arbaugh in the total amount of $40,000. Two weeks after the trial court entered judgment on the jury verdict, Y&H moved to dismiss the entire action for want of federal subject-matter jurisdiction. For the first time in the litigation, Y&H asserted that it had fewer than 15 employees on its payroll and therefore was not amenable to suit under Title VII.

Although recognizing that it was "unfair and a waste of judicial resources" to grant the motion to dismiss, App. to Pet. for Cert. 47, the trial court considered itself obliged to do so because it believed that the 15-or-more-employees requirement was jurisdictional. We reject that categorization and hold that the numerical threshold does not circumscribe federal-court subject-matter jurisdiction. Instead, the employee-numerosity requirement relates to the substantive adequacy of Arbaugh's Title VII claim, and therefore could not be raised defensively late in the lawsuit, *i.e.*, after Y&H had failed to assert the objection prior to the close of trial on the merits.

I

We set out below statutory provisions and rules that bear on this case. Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). To spare very small businesses from Title VII liability, Congress pro-

vided that:

> "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." §2000e(b).[1]

This employee-numerosity requirement[2] appears in a section headed "Definitions," §2000e, which also prescribes the meaning, for Title VII purposes, of 12 other terms used in the Act.[3]

Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. §1331. Title VII surely is a "la[w] of the United States." *Ibid.* In 1964, however, when Title VII was enacted, §1331's umbrella provision for federal-question jurisdiction contained an amount-in-controversy limitation: Claims could not be brought under §1331 unless the amount in controversy exceeded $10,000. See §1331(a) (1964 ed.). Title VII, framed in that light, assured that the amount-in-controversy limitation would not impede an employment-discrimination complainant's

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[1]The same provision further states that the term "employer" does not include the United States, corporations wholly owned by the United States, Indian Tribes, certain departments and agencies of the District of Columbia, or tax-exempt "bona fide private membership club[s]" (other than labor organizations). §2000e(b).

[2]Congress originally prescribed a 25-or-more-employee threshold. Civil Rights Act of 1964, §701, 78 Stat. 253, but lowered the minimum number of employees to 15 in the Equal Employment Opportunity Act of 1972, §2, 86 Stat. 103.

[3]The other terms defined in §2000e are: "person," "employment agency," "labor organization," "employee," "commerce," "industry affecting commerce," "State," "religion," "because of sex," "complaining party," "demonstrates," and "respondent."

access to a federal forum. The Act thus contains its own jurisdiction-conferring provision, which reads:

> "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." 42 U. S. C. §2000e–5(f)(3).[4]

Congress amended 28 U. S. C. §1331 in 1980 to eliminate the amount-in-controversy threshold. See Federal Question Jurisdictional Amendments Act of 1980, §2, 94 Stat. 2369. Since that time, Title VII's own jurisdictional provision, 42 U. S. C. §2000e–5(f)(3), has served simply to underscore Congress' intention to provide a federal forum for the adjudication of Title VII claims. See Brief for United States as *Amicus Curiae* 13; Tr. of Oral Arg. 4.

We note, too, that, under 28 U. S. C. §1367, federal courts may exercise "supplemental" jurisdiction over state-law claims linked to a claim based on federal law.[5] Plaintiffs suing under Title VII may avail themselves of the opportunity §1367 provides to pursue complete relief in a federal-court lawsuit. Arbaugh did so in the instant case by adding to her federal complaint pendent claims arising under state law that would not independently qualify for

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[4] Title VII contains a separate jurisdictional provision, 42 U. S. C. §2000e–6(b), authorizing suits by the Government to enjoin "pattern or practice" discrimination.

[5] Section 1367(a) states: "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

federal-court adjudication.

The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. Rule 12(h)(3) instructs: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." See *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004). By contrast, the objection that a complaint "fail[s] to state a claim upon which relief can be granted," Rule 12(b)(6), may not be asserted post trial. Under Rule 12(h)(2), that objection endures up to, but not beyond, trial on the merits: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at the trial on the merits." Cf. *Kontrick*, 540 U. S., at 459.

II

From May 2000 through February 2001, Jenifer Arbaugh worked as a bartender and waitress at the Moonlight Cafe, a New Orleans restaurant owned and operated by Y&H. Arbaugh alleged that Yalcin Hatipoglu, one of the company's owners, sexually harassed her and precipitated her constructive discharge.[6] In November 2001, Arbaugh filed suit against Y&H in the United States District Court for the Eastern District of Louisiana. Her complaint asserted claims under Title VII and Louisiana law. App. to Pet. for Cert. 1–2.

Arbaugh's pleadings alleged that her federal claim "ar[o]se under Title VII" and that the Federal District

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[6]See *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 147 (2004) (constructive discharge compensable under Title VII includes an employee's departure due to sexual harassment that renders "working conditions so intolerable that a reasonable person would have felt compelled to resign").

Court had jurisdiction over this claim under §1331 plus supplemental jurisdiction over her state-law claims under §1367. Record in No. 01–3376 (ED La.), Doc. 3, p. 1 (Amended Complaint). Y&H's responsive pleadings admitted Arbaugh's "jurisdictional" allegations but denied her contentions on the merits. *Id.*, Doc. 4, p. 1 (Answer to Complaint). The pretrial order submitted and signed by the parties, and later subscribed by the presiding judge, reiterated that the court was "vested with jurisdiction over [Arbaugh's Title VII claim] pursuant to 28 U. S. C. §1331," and "ha[d] supplemental jurisdiction over [her] state law claims pursuant to 28 U. S. C. §1367." *Id.*, Doc. 19, p. 2. The order listed "Uncontested Material Facts," including: "Plaintiff was employed as a waitress/bartender at the Moonlight for Defendants from May, 2000 through February 10, 2001 when she terminated her employment with the company." *Id.*, p. 3. It did not list among "Contested Issues of Fact" or "Contested Legal Issues" the question whether Y&H had the requisite number of employees under 42 U. S. C. §2000e(b). Record, Doc. 19, pp. 4–5. Nor was the issue raised at any other point pretrial or at trial.

The parties consented to trial before a Magistrate Judge. See 28 U. S. C. §636(c). After a two-day trial, the jury found that Arbaugh had been sexually harassed and constructively discharged in violation of Title VII and Louisiana antidiscrimination law. The verdict awarded Arbaugh $5,000 in backpay, $5,000 in compensatory damages, and $30,000 in punitive damages. The trial court entered judgment for Arbaugh on November 5, 2002.

Two weeks later, Y&H filed a motion under Federal Rule 12(h)(3) to dismiss Arbaugh's complaint for lack of subject-matter jurisdiction. Record, Doc. 44. As sole ground for the motion, Y&H alleged, for the first time in the proceedings, that it "did not employ fifteen or more employees [during the relevant period] and thus is not an employer for Title VII purposes." *Id.*, p. 2 (Memorandum

in Support of Rule 12(h)(3) Motion to Dismiss for Lack of Subject Matter Jurisdiction). The trial court commented that "[i]t is unfair and a waste of judicial resources to permit [Y&H] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." App. to Pet. for Cert. 47. Nevertheless, reciting the text of Rule 12(h)(3), see *supra*, at 5, the trial court allowed Y&H to plead that it did not qualify as an "employer" under Title VII's definition of that term. App. to Pet. for Cert. 47–48; see *supra*, at 3.

Discovery ensued. The dispute over the employee count turned on the employment status of Y&H's eight drivers, engaged to make deliveries for the restaurant, and the company's four owners (the Moonlight Cafe's two managers and their shareholder spouses). As the trial court noted, "[i]f either the delivery drivers or the four owners are counted with the persons shown on the payroll journals, then Y&H employed fifteen or more persons for the requisite time." App. to Pet. for Cert. 27. After reviewing the parties' submissions, however, the trial court concluded that neither the delivery drivers nor the owner-managers nor their shareholder spouses qualified as "employees" for Title VII purposes. *Id.*, at 32–43. Based on that determination, the trial court vacated its prior judgment in favor of Arbaugh, dismissed her Title VII claim with prejudice, and her state-law claims without prejudice. *Id.*, at 23.

The Court of Appeals for the Fifth Circuit affirmed. 380 F. 3d 219 (2004). Bound by its prior decisions, the Court of Appeals held that a defendant's "failure to qualify as an 'employer' under Title VII deprives a district court of subject matter jurisdiction." *Id.*, at 224 (citing, *e.g.*, *Dumas* v. *Mt. Vernon*, 612 F. 2d 974, 980 (1980)). Dismissal for want of subject-matter jurisdiction was proper, the Court of Appeals ruled, for the record warranted the con-

clusion that Y&H's delivery drivers, its owner-managers, and their shareholder wives were not "employees" for Title VII purposes, 380 F. 3d, at 225–230, and it was undisputed that Y&H "did not employ the requisite 15 employees without the inclusion of" those persons, *id.*, at 231.

We granted certiorari, 544 U. S. 1031 (2005), to resolve conflicting opinions in Courts of Appeals on the question whether Title VII's employee-numerosity requirement, 42 U. S. C. §2000e(b), is jurisdictional or simply an element of a plaintiff's claim for relief. Compare, *e.g.*, 380 F. 3d, at 223–225 (Title VII's employee-numerosity requirement is jurisdictional), and *Armbruster* v. *Quinn*, 711 F. 2d 1332, 1335 (CA6 1983) (same), with, *e.g.*, *Da Silva* v. *Kinsho International Corp.*, 229 F. 3d 358, 361–366 (CA2 2000) (Title VII's employee-numerosity requirement is not jurisdictional); *Nesbit* v. *Gears Unlimited, Inc.*, 347 F. 3d 72, 76–83 (CA3 2003) (same); *EEOC* v. *St. Francis Xavier Parochial School*, 117 F. 3d 621, 623–624 (CADC 1997) (Americans with Disabilities Act's employee-numerosity requirement, 42 U. S. C. §12111(5)(A), resembling Title VII's requirement, is not jurisdictional).

III

"Jurisdiction," this Court has observed, "is a word of many, too many, meanings." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 90 (1998) (internal quotation marks omitted). This Court, no less than other courts, has sometimes been profligate in its use of the term. For example, this Court and others have occasionally described a nonextendable time limit as "mandatory and jurisdictional." See, *e.g.*, *United States* v. *Robinson*, 361 U. S. 220, 229 (1960). But in recent decisions, we have clarified that time prescriptions, however emphatic, "are not properly typed 'jurisdictional.'" *Scarborough* v. *Principi*, 541 U. S. 401, 414 (2004); accord *Eberhart* v. *United States*, 546 U. S. ___, ___ (2005) *(per curiam)* (slip op., at 4–

7); *Kontrick*, 540 U. S., at 454–455. See also *Carlisle* v. *United States*, 517 U. S. 416, 434–435 (1996) (GINSBURG, J., concurring).

The dispute now before us concerns the proper classification of Title VII's statutory limitation of covered employers to those with 15 or more employees. If the limitation conditions subject-matter jurisdiction, as the lower courts held it did, then a conclusion that Y&H had fewer than 15 employees would require erasure of the judgment for Arbaugh entered on the jury verdict. But if the lower courts' subject-matter jurisdiction characterization is incorrect, and the issue, instead, concerns the merits of Arbaugh's case, then Y&H raised the employee-numerosity requirement too late. Its pretrial stipulations, see *supra*, at 6, and its failure to speak to the issue prior to the conclusion of the trial on the merits, see Fed. Rule Civ. Proc. 12(h)(2), *supra*, at 5, would preclude vacation of the $40,000 judgment in Arbaugh's favor.

On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. "Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination." 2 J. Moore et al., Moore's Federal Practice §12.30[1], p. 12–36.1 (3d ed. 2005) (hereinafter Moore). Judicial opinions, the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva*, 229 F. 3d, at 361. We have described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question whether the federal court had authority to

adjudicate the claim in suit. *Steel Co.*, 523 U. S., at 91.

Cases of this genre include *Hishon* v. *King & Spalding*, 467 U. S. 69 (1984), and *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244 (1991). *Hishon* involved a Title VII claim brought by a lawyer denied partnership in a law firm. The District Court ruled that Title VII did not apply to the selection of partners and dismissed the case for lack of subject-matter jurisdiction. The Court of Appeals affirmed that judgment. We noted that the District Court's reasoning "ma[de] clear that it dismissed petitioner's complaint on the ground that her allegations did not state a claim cognizable under Title VII." 467 U. S., at 73, n. 2. Disagreeing with the lower courts, we held that Title VII applies to partnership decisions. *Id.*, at 73–78. That holding, we said, "ma[de] it unnecessary to consider the wisdom of the District Court's invocation of Rule 12(b)(1), as opposed to Rule 12(b)(6)." *Id.*, at 73, n. 2. The former Rule concerns subject-matter jurisdiction, the latter, "failure to state a claim upon which relief can be granted." See *supra*, at 5. Our opinion in *Hishon* thus raised, but did not decide, the question whether subject-matter jurisdiction was the proper rubric for the District Court's decisions.[7]

In *Arabian American Oil Co.*, we affirmed the judgment of the courts below that Title VII, as then composed, did not apply to a suit by a United States employee working

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[7] Y&H features *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202 (1997), as supportive of the jurisdictional character of the employee-numerosity requirement. Brief for Respondent 8–10. Y&H urges that the Court must have considered the requirement jurisdictional, for *Walters* held definitively that, under the correct legal standard, the defendant had more than 15 employees. If the requirement had been seen as a merits issue, Y&H contends, the Court would have remanded the employee count for determination by the trier of fact. But the parties in *Walters* apparently stipulated to all relevant facts, leaving nothing for a fact trier to resolve on remand. Cf. 519 U. S., at 211–212.

abroad for a United States employer.[8] That judgment had been placed under a lack of subject-matter jurisdiction label. We agreed with the lower courts' view of the limited geographical reach of the statute. 499 U. S., at 246–247. *En passant*, we copied the petitioners' characterizations of terms included in Title VII's "Definitions" section, 42 U. S. C. §2000e, as "jurisdictional." See 499 U. S., at 249, 251, 253. But our decision did not turn on that characterization, and the parties did not cross swords over it. See *Steel Co.*, 523 U. S., at 91 (declining to follow a decision treating an issue as jurisdictional because nothing "*turned upon* whether [the issue] was technically jurisdictional" in that case). In short, we were not prompted in *Arabian American Oil Co.* to home in on whether the dismissal had been properly based on the absence of subject-matter jurisdiction rather than on the plaintiff's failure to state a claim. 499 U. S., at 247.[9]

The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28 U. S. C. §§1331 and 1332. Section 1331 provides for "[f]ederal-question" jurisdiction, §1332 for "[d]iversity of citizenship" jurisdiction. A plaintiff properly invokes §1331 jurisdiction when she pleads a colorable claim "arising under" the Constitution

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[8] Congress subsequently amended Title VII to extend protection to United States citizens working overseas. See Civil Rights Act of 1991, §109(a), 105 Stat. 1077, codified at 42 U. S. C. §2000e(f) ("With respect to employment in a foreign country," the term "employee" "includes an individual who is a citizen of the United States.").

[9] In *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107 (1988), also featured by Y&H, see Brief for Respondent 12, a plurality of this Court noted that "[r]eactivation of state proceedings after the conclusion of federal proceedings serves [a] useful function," in part because "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees." 486 U. S., at 119, n. 5. That fleeting footnote addressed the relative administrative provinces of the EEOC and state agencies. It did not speak of federal-court subject-matter jurisdiction, which was not at issue in the case.

or laws of the United States. See *Bell* v. *Hood*, 327 U. S. 678, 681–685 (1946).[10] She invokes §1332 jurisdiction when she presents a claim between parties of diverse citizenship that exceeds the required jurisdictional amount, currently $75,000. See §1332(a).

Arbaugh invoked federal-question jurisdiction under §1331, but her case "aris[es]" under a federal law, Title VII, that specifies, as a prerequisite to its application, the existence of a particular fact, *i.e.*, 15 or more employees. We resolve the question whether that fact is "jurisdictional" or relates to the "merits" of a Title VII claim mindful of the consequences of typing the 15-employee threshold a determinant of subject-matter jurisdiction, rather than an element of Arbaugh's claim for relief.

First, "subject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived." *United States* v. *Cotton*, 535 U. S. 625, 630 (2002). Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 583 (1999). Nothing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met.

Second, in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own. See 5B C. Wright & A. Miller, Federal Practice and Proce-

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[10] A claim invoking federal-question jurisdiction under 28 U. S. C. §1331, *Bell* held, may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is "immaterial and made solely for the purpose of obtaining jurisdiction" or is "wholly insubstantial and frivolous." 327 U. S., at 682–683; see *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998). Arbaugh's case surely does not belong in that category.

dure §1350, pp. 243–249 (3d ed. 2004); 2 Moore §12.30[3], pp. 12–37 to 12–38. If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of contested facts. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151 (2000).

Third, when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety. See 16 Moore §106.66[1], pp. 106–88 to 106–89. Thus in the instant case, the trial court dismissed, along with the Title VII claim, pendent state-law claims, see *supra*, at 4, fully tried by a jury and determined on the merits, see App. to Pet. for Cert. 23, 47. In contrast, when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U. S. C. §1367, over pendent state-law claims. See 16 Moore §106.66[1], pp. 106–86 to 106–89.

Of course, Congress could make the employee-numerosity requirement "jurisdictional," just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U. S. C. §1332. But neither §1331, nor Title VII's jurisdictional provision, 42 U. S. C. §2000e–5(f)(3) (authorizing jurisdiction over actions "brought under" Title VII), specifies any threshold ingredient akin to 28 U. S. C. §1332's monetary floor. Instead, the 15-employee threshold appears in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982). Given the "unfair[ness]" and "waste of judicial resources," App. to Pet. for Cert. 47, entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, we think it the sounder course to refrain from constricting §1331 or Title VII's jurisdictional provision, 42 U. S. C. §2000e–5(f)(3), and to leave the ball in Con-

gress' court. If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional,[11] then courts and litigants will be duly instructed and will not be left to wrestle with the issue. See *Da Silva*, 229 F. 3d, at 361 ("Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question."). But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.

* * *

For the reasons stated, the judgment of the Court of

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[11] Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case. Certain statutes confer subject-matter jurisdiction only for actions brought by specific plaintiffs, *e.g.*, 28 U. S. C. §1345 (United States and its agencies and officers), 49 U. S. C. §24301(*l*)(2) (Amtrak), or for claims against particular defendants, *e.g.*, 7 U. S. C. §2707(e)(3) (persons subject to orders of the Egg Board); 28 U. S. C. §1348 (national banking associations), or for actions in which the amount in controversy exceeds, *e.g.*, 16 U. S. C. §814, or falls below, *e.g.*, 22 U. S. C. §6713(a)(1)(B), 28 U. S. C. §1346(a)(2), a stated amount. Other jurisdiction-conferring provisions describe particular types of claims. See, *e.g.*, §1339 ("any civil action arising under any Act of Congress relating to the postal service"); §1347 ("any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants"). In a few instances, Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U. S. 749, 756–761 (1975) (42 U. S. C. §405(h) bars §1331 jurisdiction over suits to recover Social Security benefits).

Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.